THE CONSTITUTIONAL HISTORY OF SCOTLAND FROM EARLY TIMES TO THE REFORMATION

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BLACKIE & SON LTD.

The Constitutional History of Scotland

FROM EARLY TIMES TO THE REFORMATION

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LONGMANS, GREEN, AND CO.
39 PATERNOSTER ROW, LONDON, E.C.4
NEW YORK, TORONTO
BOMBAY, CALCUTTA, AND MADRAS
1924

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PREFACE

THERE is room for a new work dealing specially with the Constitutional History of Scotland before the Reformation. The subject has been treated only incidentally, and necessarily imperfectly, in the general Histories of Scotland, and the works of the late Mr Cosmo Innes, though still valuable, are naturally, after the lapse of sixty years, in some respects inadequate and antiquated. The late Dr Skene's "Celtic Scotland" is a monument of painstaking research, but it has also been superseded in part by the later researches of Celtic scholars. The present work is an attempt to review the subject as a whole from the available original sources, with the aid of the more recent investigations bearing on specific parts or aspects of it.

The great difficulty that meets the student is the meagreness of the sources for the Celtic period, *i.e.*, before the twelfth century. The method adopted has been to examine the period in the light of the institutions of ancient Ireland and Wales, and also of the Anglo-Saxons, in their bearing on the Constitutional History of Scotland up to the twelfth century, and to discover from the all-too-meagre records of North Britain during this period whether, and how far, identical or similar institutions prevailed among the Picts, Scots, Britons, and Anglo-Saxons inhabiting what ultimately became the Scottish Kingdom. For the early and the later Feudal periods the sources gradually became fuller and more luminous, though the student is still left to grope his way towards anything

like definite conclusions on specific points or features which must be regarded as still *sub judice.*

I have been materially assisted by Mr James A. R. MacKinnon in the investigation and discussion of the material, whilst solely responsible for the formulation of it. I desire further to express my indebtedness to Professor Watson, of the Chair of Celtic in this University, for valuable suggestions in reference to Part I., and to Professor Hannay, of the Chair of Scottish History, who, by his valuable researches, has thrown new light on specific points treated in Part III.

J. M.

The University of Edinburgh,
March 1924.

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THE CONSTITUTIONAL HISTORY OF SCOTLAND

PART I

ORGANISATION AND GOVERNMENT IN THE CELTIC PERIOD

CHAPTER I

THE ANCIENT MONARCHY—FABLE AND FACT

THE "Pictish Chronicle," which was composed in the tenth century, mentions rather doubtfully the belief in the origin of the Scots from Scota,[1] daughter of the Pharaoh who was drowned in the Red Sea. This naïve belief reappears in some of the later chronicles, and in one of these, dating from the thirteenth century, the story to which this derivation had given rise is told in some detail.[2] In its more elaborate form it is first given by Fordun in the fourteenth century. Fordun gravely relates the marriage of Scota to a Greek prince, Gaythelus (the Latin form of the Celtic Gaedel), his expulsion with his wife and followers after the disaster in the Red Sea, his settlement in Spain, the foundation of the Scottish kingdom in Ireland by his descendants, the migration of a colony of these Scots to North Britain, and the foundation of this second Scottish kingdom by Fergus, son of Ferchard, in 330 B.C. This kingdom lasted along-

[1] See "Leabar Gabhàla," Pt. I., ed. by Macalister and MacNeill; "Chronicles of the Picts and Scots," ed. by Skene, 3.

[2] *Ibid.*, 194 f.

side that of the Picts, who had settled in North Britain somewhat earlier, till 360 A.D., when the Scots were driven out by the usurper of the Roman dominion in Britain, Maximus. Forty years later, however—in the beginning of the fifth century—they regained their lost territory under Fergus, son of Erc, who founded a new line of kings which continued down to Kenneth MacAlpin, who in the middle of the ninth century united the kingdoms of the Picts and the Scots.[3]

John Major, who wrote his "History of Greater Britain" in the early years of the sixteenth century, is more critical. Whilst bringing the Scots from Spain, he treats the story of Scota and Gaythelus as a fable. But he, too, puts back the foundation of the Scottish kingdom in North Britain to Fergus MacFerchard in the fourth century B.C.[4] His contemporary, Hector Boece, on the other hand, revels in this fabulous element and romances wildly. Distinguished humanist though he was, there is not a trace of the critical spirit in this part of his credulous narrative. He even reports verbatim the speeches made by kings and nobles on important occasions, even the most remote of them, for his classic studies had made him an adept in this form of invention. He knows of Parliaments summoned at intervals to discuss the national affairs, and has no difficulty in finding the constitution of his own day reflected in those far-off pre-Christian centuries. The laws, he further informs us, were made by the general consent of the people, and rulers who acted contrary to these laws were put to death or driven into exile. His monarchy is a strictly limited one, the king being bound to govern in accordance with the advice of his nobles.[5]

Like Major, Buchanan rejects the Scota and Gaythelus fable.[6] For the rest, he accepts the story of the ancient foundation of the kingdom of Fergus MacFerchard, and, in spite of his humanist training, is as uncritical as Boece

[3] "Chronica Gentis Scotorum," lib. i.-iv.

[4] Lib. i. Chaps. 9 and 11.

[5] The first seven books bring the history down to the recovery of the Scottish kingdom in North Britain by Fergus MacErc.

[6] Lib. ii. Chaps. 11 and 12.

in his treatment of the earlier history. He does little more than compress the fabulous narrative of his predecessor, though he judiciously refrains from inflicting on posterity the debates of these antique Parliaments and suppresses the worst impossibilities. Like Boece, he has no difficulty in projecting the later constitutional monarchy into the centuries long before the Roman conquest of Britain, and infusing into this imaginary history the political ideas of the *De Jure Regni apud Scotos*.

This fabulous version of the ancient history seems to have been elaborated by the mediæval Scottish chroniclers, working with the material of ancient Irish tradition,[7] in connection with the controversy over the English claim to superiority over Scotland and the concurrent claim of the English Church to supreme jurisdiction over the Scottish. In addition to other arguments, the Scots attempted to invalidate this claim by investing the Scottish crown with an antiquity which reached back 1000 years before the final establishment of the English monarchy in South Britain. The late Dr Skene, in his valuable introduction to the "Chronicles of the Picts and Scots," has elucidated the gradual growth of this fabulous version under the influence of this controversy by comparing the later with the earlier chronicles. The earlier chronicles[8] belong, he thinks, to the tenth and eleventh centuries—to a period before the controversy over the English claims had arisen. His reading of these chronicles is that from the fifth century till the middle of the ninth there was in North Britain a Pictish kingdom, extending from the Forth to the Pentland Firth, and ruled by a series of Pictish kings.[9] Similarly, from the end of the same century or the beginning of the sixth to the middle of the eighth there was a Scottish kingdom in Dalriada, corresponding roughly to the modern Argyllshire, and separated from the Pictish kingdom by the central watershed known as Drumalban. From the middle of the eighth century to the middle of the ninth this Scottish kingdom came, as the result of conquest, under

[7] The Scota-Gaythelus myth, for instance.
[8] They are given in the "Chrons. of P. and S."
[9] Preface to the "Chrons. of P. and S.," 105.

the rule of the Pictish kings, and the two kingdoms were thus united under their rule. About the middle of the ninth century the kingship of this united kingdom passed to Kenneth MacAlpin, a descendant of the Scottish kings of Dalriada, whose mother seems to have been a Pictish princess. His accession was, it seems, the result of a successful battle with the Picts, who had been weakened by attacks of Danish marauders, and in this weakened state were overcome by Kenneth and a Scottish army.

The later chronicles of the Picts and Scots from the second half of the twelfth century onwards, when the recurring question of the English claim makes itself powerfully felt, reveal in various fashion the striving to meet this claim by tracing the ancestry of the Scottish kings back to the pre-Christian age. In that of 1165 the genealogy of William the Lion is carried back to Gaythelus, and even beyond to Adam![10] In another which appeared later in the same reign the fabulist adopts the expedient of placing the line of Scottish kings, which he begins with Fergus MacErc in the year 443 B.C., before the line of Pictish kings, which, according to him, displaced the Scottish line. He then constructs out of the two a list which covers fully 1300 years down to the middle of the ninth century A.D., when the Scot, Kenneth MacAlpin, displaced the last of the Pictish rulers.[11] The same expedient is employed in two chronicles belonging to the second half of the thirteenth century.[12] The later of the two differs, however, in substituting Fergus MacFerchard for Fergus MacErc as the first ancient Scottish king. It gives, moreover, in some detail the Scota-Gaythelus fable and its sequel, which reappears later in Fordun. Reckoning from John Balliol backwards, its author knows to a day the duration of the monarchy in Scotland, which he sets down as 1977 years, 9 months, and 8 days! Finally, in the early part of the fourteenth century, after the successful vindication by Bruce of Scottish independence, a fifth chronicle appears with the same object of establishing the vast antiquity of the Scottish monarchy. Only, in this case the fabulist reverses

[10] "Chrons. of P. and S.," 130 f.

[11] *Ibid.*, 148 f.

[12] *Ibid.*, 171 f.

the order of the Scottish and Pictish kings, and places the latter before the former.[13] All the same, he succeeds in making up the formidable number of centuries and even in subjoining the odd months, if not the days, wherewith to dumbfounder the would-be conquerors of Scotland. Out of these documents, which appeared at intervals when the question of the English claim became acute, Fordun worked up the story which Boece, who seems to have made use in addition of a chronicle attributed to a certain Veremund, Archdeacon of St Andrews, dressed out in his own rhetoric fashion, and Buchanan, in spite of some critical pruning, too credulously accepted.

The claim made in opposition to the would-be English overlordship of Scotland by the mediæval chroniclers, and adduced in State documents in behalf of a Scoto-Pictish monarchy in North Britain, extending backwards beyond even the Christian era, is thus quite unhistoric. What is historically certain is that after the collapse of the Roman dominion in Britain in the beginning of the fifth century, and as the result of the transition that followed it, four peoples emerge as occupying portions of the territory north of the Tweed, afterwards known as Scotland or Scotia. From the reliable testimony of Bede we learn that these peoples consisted of Britons, Picts, Scots, and Angles.[14] Bede further refers to the tradition of the early settlement of the Scots in Ireland, but knows nothing of the later fable of their Egyptian origin, etc. He mentions, too, the arrival of the Picts from Scythia, which appears to mean for him Scandinavia. But he only gives these details about the Picts and Scots as a tradition, and some of the details he adds are evidently of a legendary character, *i.e.*, the story of the Picts applying to the Scots in Ireland for wives, in explanation of the Pictish law of succession through the female. He also mentions the settlement of a Scottish colony in North Britain under a chief Reuda or Riata, apparently in the third century A.D., the region being called after this chief Dalriada — the district of

[13] "Chrons. of P. and S.," 285 f.
[14] "Hist. Eccl.," i. 1 and iii. 6.

Reuda.[15] The Picts and Scots are thus, according to Bede, found occupying territory in North Britain, north of the Forth and Clyde, even before the collapse of the Roman dominion in the beginning of the fifth century. But there is nothing in his account that would lead us to conclude that their advent in this region was anything like so remote as the mediæval Scottish chroniclers believed it to be.

The two other peoples, the Britons and the Angles, who are found in possession of the remainder of the territory between the Tweed and the Solway on the one hand, and the Forth and Clyde on the other, which ultimately became Scottish, only emerge as independent peoples after the departure of the Romans. The Britons were the native population which formed the post-Roman kingdom of Strathclyde. The Angles were Teutonic invaders who settled between the Tweed and the Forth, and formed part of the kingdom of Northumbria, which extended as far south as the Humber (North-Humbraland). Bede definitely places their arrival in Britain in the year 449.[16] But there is reason to believe, as Skene contends,[17] that parties of these invaders had effected settlements on the east coast even before the final collapse of the Roman dominion, though it was only after it that these settlements were extended and consolidated. Even throughout the sixth century there were still native princes of Lothian, *i.e.*, between the Forth and the Tweed, and the conquest of this region by the Angles was not complete before the beginning of the seventh century.

Of the four kingdoms which ultimately appear in North Britain after the fall of the Roman dominion, only two—those of the Picts and Scots—may thus be assigned an

[15] Professor Watson thinks that Bede got his information of this settlement from Adamnan, and if so the statement may be considered reliable. It finds some confirmation in the epistle of St Patrick to Coroticus, in which he mentions Scots as well as Picts as assisting Coroticus, Prince of Strathclyde, in his invasion of Ireland in Patrick's time, *i.e.*, middle of fifth century. (See the epistle in Haddan and Stubbs, "Eccles. Documents," ii. 314 f.)

[16] *Ibid.*, i. 15.

[17] "Chrons. of P. and S.," Preface, 89-90.

origin earlier than the beginning of the fifth century. The settlement of the Scots in Dalriada under Reuda or Riata about the middle of the third century may be authentic. But if so, it was only the nucleus of the later Scottish settlement under Fergus MacErc at the end of the fifth century or the beginning of the sixth, which is undoubtedly historic, and which the later mediæval chroniclers transfer back to pre-Christian times. In the case of the Pictish kingdom it is also possible to assign an origin going back beyond the collapse of the Roman dominion. But it does not seem safe to go farther back than the century preceding this collapse. In the first Christian century North Britain beyond the Forth and Clyde appears in the possession, not of a single people, but of a number of tribes, of which the geographer Ptolemy gives the names. Among these are the Caledonians, and Tacitus applies to the whole region the general name of Caledonia. From this it would appear that the Caledonians were the leading tribe whose territory is supposed by Professor Watson to have extended from Loch Lomond to the Beauly Firth, and that they took the lead in what we might call the Caledonian confederacy which opposed Agricola in the second half of the first century A.D. In the third and fourth centuries they are mentioned along with another leading tribe, which in the former century is called the Maiatae, and in the latter the Verturiones. Towards the close of the Roman dominion in Britain the general name of Picts displaces that of the Caledonians as the designation of the inhabitants of the region north of the Forth and Clyde. Thus by the end of the fourth century a fusion of these tribes under this designation appears to have taken place.

The most feasible explanation of this fusion is that the Picts, whom an old tradition first locates in Orkney, had extended their settlements to the northern mainland and gradually enlarged their sway southwards over the region north of the Forth and Clyde, until towards the end of the fourth century they became the dominant power within it. As the result of the weakening of the Roman dominion, or its final collapse, they even succeeded in pushing settlements south of the Forth in the district comprising what

is now part of Lothian, Linlithgow and Stirlingshires. An offshoot of them seems to have penetrated even farther south into Galloway, where Bede knows of a Pictish settlement.

In the case of all these peoples who, from the fifth or early sixth century onwards, appear in occupation of North Britain from the Tweed and Solway northwards, the form of government was or became the kingly one. The earlier chronicles contain lists of these kings which, from this period at least, are fairly reliable. Bede definitely makes Ida of Bernicia,[18] the region south-east of the Forth, the first king of the Angles in the middle of the sixth century (547),[19] though this does not preclude Anglic settlements in this region at an earlier period. A list of the kings of Strathclyde appears in the addition to the *Historia Britonum* of Nennius, and from Ridderch Hael,—Roderick the Liberal —who ruled from 573 to 601, and is mentioned by Adamnan as a contemporary of Columba, their historicity seems to be established.[20] Skene is of opinion that from the middle of the fifth century the list of the Pictish kings may be accepted as historic,[21] and the testimony of Adamnan, who records the relations of Columba with King Brude, is again available to confirm the list from at least the second half of the sixth century. There is also a list of the Scottish kings of Dalriada from Fergus MacErc at the beginning of this century, and here, too, confirmation is forthcoming from Adamnan for those who flourished in Columba's time.

The relation of these kingdoms from the sixth century was one of recurring friction and feud. The Anglic kings strove to extend their territory at the expense of the Strathclyde Britons and the Picts, and even the Scots in the remote west, and at times with considerable success. Oswald of Northumbria, for instance, is said generally by Bede to have brought all these under his rule towards the middle of the seventh century.[22] His brother and successor, Oswiu, is

[18] Afterwards enlarged into Northumbria.
[19] " Hist. Eccl.," v. 24.
[20] " Chrons. of P. and S.," Preface, 94-95.
[21] *Ibid.*, 103-105.
[22] " Hist. Eccl.," iii. 6.

represented as maintaining his dominion over the greater part of the Picts.[23] This dominion evidently, however, did not extend over the whole of Pictland, and some years after Oswiu's death the Picts put an end to it by their signal victory over his son Ecgfrith at Dunnichen in Forfarshire. This victory freed also the Scots of Dalriada and the Britons of Strathclyde from Anglic domination,[24] and decisively checked the Anglic striving to bring North Britain under their sway. We hear, too, of recurring conflict during this period between the Picts and the Scots and Britons, and ultimately about the middle of the eighth century, in the reign of Angus MacFergus, the Picts appear as wielding a virtual supremacy in North Britain. From this time to the middle of the ninth century Dalriada seems to have been a Pictish province, whilst the Britons of Strathclyde seem to have maintained their independence till the tenth century. In the early part of the ninth century the Pictish kingdom was, however, exposed to Norse attack, and it was probably this weakening of the Pictish power that enabled the Scot, Kenneth MacAlpin, who was also of Pictish descent, to win the Pictish throne (*c.* 844) and thus unite the Scots and Picts under a Scottish dynasty. These kings ere long cease to be called kings of Pictavia or Pictland, and become kings of Alba (Albania), which designates the wider kingdom over which they ruled. In the beginning of the eleventh century it was further enlarged by the inclusion of the region of Lothian between the Forth and the Tweed, as the result of the victory of Malcolm II. over the English at Carham in 1018, and by the incorporation of Strathclyde into the Scottish kingdom—henceforth known as Scotia—by his grandson Duncan after Malcolm's death in 1034.

This early mediæval Scottish kingdom was, however, not an organic one. The sway of the kings of Alba was not very effective beyond the Grampians, where the Mormaers of Moray were not very submissive to the authority of the crown. Moreover, it did not include for more than two centuries longer the whole of the territory from the Tweed and the Solway to the Pentland Firth, for by this time

[23] "Hist. Eccl.," iii. 24.

[24] *Ibid.*, iv. 26.

another people, the Norsemen, had established themselves in the remote north as the result of repeated invasions from Norway and the Orkney and Shetland Isles which they had conquered from the Celts. They also took possession of the Hebrides and effected settlements on the mainland.[25] It was not till after the battle of Largs, in 1263, that Alexander III. succeeded in extending the sway of the Scottish crown over this Norse region, and not till the fifteenth century that Orkney and Shetland were incorporated into the Scottish kingdom.[26]

It was thus out of the fusion and consolidation of the four kingdoms which ultimately emerged after the collapse of the Roman dominion in North Britain that the later Scottish kingdom was evolved. The process was mainly, though not exclusively, one of conflict. The Picts seem to have been numerically the strongest of these peoples, and it was due to them in the first place that the threatened Anglic supremacy in North Britain was decisively frustrated at Dunnichen in the latter half of the seventh century. With the weakening of the Pictish power owing to early Norse attacks, the supremacy passed to the Scots, again apparently as the result of a successful battle or battles on the part of the Scoto-Pictish Kenneth MacAlpin. During the next century and a half the Scots succeeded in imposing their language as well as a Scottish dynasty on the conquered Picts, though there is some evidence (ogham inscriptions, etc.) to show that Gaelic must have come into Pictland before the ninth century. At the end of this period the Scottish monarchy had become strong enough to absorb, again by a successful battle, the Anglic kingdom lying between the Forth and the Tweed, and to add to it the British kingdom of Strathclyde. Two and a half centuries later another successful battle enabled Alexander III. to complete the process at the expense of the Norsemen at the other extreme of the kingdom. There were, however,

[25] Caithness, Professor Watson informs me, was thoroughly Norse, Sutherland less so, Ross much the same as Sutherland. Norse place names stop at the Beauly Valley.

[26] MacKinnon, "Social and Industrial History of Scotland from the Earliest Times to the Union," 14.

other contributory causes besides the exercise of force in the welding of what became the kingdom of Scotland into one State. The affinity of race and language of three of the original four peoples doubtless exerted an influence in this direction. The Picts, Scots, and Britons were all of Celtic race and spoke a Celtic language of which Pictish, Gaelic, and British or Welsh were but varying forms. In the case of the Picts there has been much debate on the question of both their race and language. But the most probable inference is that they were Celts and spoke a Celtic language.[27] The fourth people, the Angles, were indeed of Teutonic race and spoke a Teutonic language. But they do not seem to have succeeded in the early mediæval centuries in completely ousting the old Celtic race and the old Celtic language in the region between the Forth and the Tweed conquered by them. There are between 600 and 700 Celtic place names, about equally divided between Gaelic and British, within this region. Here too, therefore, there must have been a Celtic element in the population to facilitate the process of fusion under Scottish auspices, though ultimately, with the gradation of the centre of the Scottish kingdom towards the south and the later English influence that began in the reign of Malcolm III. towards the end of the eleventh century, English asserted itself as the language of at least the southern portion of Scotland.

In addition to the influence of race and language, religion also contributed its quota to the process of union.

[27] See MacKinnon, "Social and Industrial History of Scotland," 6 *et seq.* In a recent article in the *Scotsman* (6th February 1922) Mr Diack attempts to show that the inscription on the Newton stone in Aberdeenshire is not only Celtic, but Gaelic, with differentiæ distinguishing it from the Irish of the period, which he thinks was about 400 A.D. His contention is that the Gaelic oghams of the east coast are of independent, *i.e.*, non-Irish, origin, and already, in 400 A.D., the language which they represent differs from the Irish language or Erse. Professor Watson thinks that he has failed to establish his contention. Wherever oghams are found elsewhere they came from Ireland, and it is more probable that those of the north-east coast were introduced by Irish adventurers penetrating into Pictland. To this extent at least Gaelic, *i.e.*, Irish, had made some progress among the Picts before the advent of Kenneth MacAlpin in the ninth century.

Christianity ultimately became the common religion of these peoples. The profession of Christianity by no means tends to unify a number of warring States in the face of national or racial antagonisms. These may prove and often have proved impervious to its universalistic teaching, especially when the warring peoples profess different ecclesiastical versions of it which are identified with racial or national differences. But given the co-operation of other formative influences, the profession of a common religion may substantially contribute to the general result, and it is certain that the more highly organised system of church government represented by the Roman Catholic Church, which ultimately displaced the less highly organised Celtic form, contributed something to the unifying of the kingdom.

Last, but not least, there came into operation the influence of the intensified spirit of nationality which the long-continued conflict with England over the claim to the overlordship of Scotland gradually evolved, and which reached its culmination in the War of Independence, though the cleavage between Highlands and Lowlands long survived to mar, if not to unmake, the long drawn-out process of this national unity. As the menace of Roman conquest had long before welded the Caledonians into a confederacy and ultimately a kingdom in opposition to the Roman power, so the menace of the English overlordship powerfully fostered the national spirit from the twelfth to the fourteenth centuries.

CHAPTER II

THE EVIDENCE OF THE ANCIENT IRISH LAWS IN RELATION TO NORTH BRITAIN

THE subject of organisation and government in the Celtic period (from the sixth to the end of the eleventh century) is an obscure one because the sources are so scanty. At the commencement of the period and during a great part of it North Britain, as we have seen, was parcelled into a number of kingdoms often embroiled in war with one another, or (from about 800 A.D.) with the invading Danes and Norsemen. Effective government within these States seems to have been spasmodic, and the evolution of one kingdom out of these warring States was a slow process. The whole period is one of transition whose bellicose, turbulent character is the most characteristic feature of its meagre annals. They tell us, not always quite clearly, about the succession of kings of Dalriada and Alba, and after their union the line of succession is clear enough. They mention their accessions, their battles, and their deaths —frequently violent deaths. Before the twelfth century they tell us little else. The landmarks of the territorial expansion of the State are visible to the discerning eye. But how the country was governed, what was its political and social organisation, what the actual power of the king, what the legal system and how it was administered, we can with difficulty descry before the twelfth century. It is only in the reign of David I. in the first half of this century that its constitutional features acquire substantial shape.

Some light on the institutions of the period is reflected from those of the Celtic race to which the Picts, Scots, and Britons belonged, and it is essential to examine our meagre

sources in the light of these institutions if we would attain to anything like an intelligible view of the all too slender indications of the state of things these sources imply rather than describe. We can, in fact, make little or nothing of these unless we have an adequate knowledge of the conditions prevailing in ancient Ireland and Wales, and even in Gaul and Anglo-Saxon England, which have a direct or indirect bearing on those prevailing in North Britain.

We know from Cæsar something of the conditions that prevailed in Gaul—the old homeland from which these peoples migrated to Ireland and Britain. The ancient laws of the Irish and the Welsh, which were written long after this migration, have been preserved. We have, too, the Anglo-Saxon laws which mirror the political and social institutions of the Teutonic settlers in Britain. The Welsh laws may relatively be taken as applying to the Britons of Strathclyde. The Scots of Dalriada would carry with them the customs and laws of their kinsmen of Ireland (Scotia). The Angles of Lothian shared those of their kinsmen of the kingdom of Northumbria.

In the case of the Picts we have no such direct evidence to guide us. But it is clear from Adamnan's "Life of Columba" that their institutions were akin to those of their neighbours, the Scots and the Strathclyde Britons. From these sources we may therefore attempt to form a fairly accurate conception of the organisation and government of these peoples, out of which the Scottish people took shape in the Celtic period of the history of what ultimately became Scotland.

Celtic Gaul in Cæsar's time contained about eighty petty states located in the region between the Pyrenees and the Rhine. These Gallic states do not seem to have formed a general confederacy under a supreme monarch. A number of them were in fact republics, and where the kingship existed it was exceptional and was elective. In the case of the republics the head of the State was elected annually. He was known as the Vergobret, and exercised for the year of his office the supreme judicial and administrative function. In time of war a military leader (Dux) was

chosen in addition for the occasion.[1] The decision in matters of general interest was vested in the council of the people. These states were, however, by no means what are understood by democracies. The people consisted of the two privileged classes of the nobles and the priests—the proprietors of the soil and the priestly class known as Druids, which was highly organised and wielded great influence. The Druids consecrated those elected to office, and acted as judges and arbitrators in disputes. They possessed the power of excommunication. The wealthier proprietors also constituted a powerful class with numerous retainers and dependants (*Comités*, *clientes*). The Government was thus an aristocratic and priestly one. The mass of the people was in a servile condition. "The people (Plebs)," says Cæsar, "is held in a state almost of serfage, and is not summoned to any council." The number of small peasant proprietors seems to have been limited; that of dependants, more or less servile, very large. The people in the larger sense, the Plebs, appear only to have counted politically as the instruments of the ambition of some powerful magnate who owed his elevation to popular support. In such cases there was an approach to something like democratic government in as far as the mass of the people counted in the exercise of political power.[2]

In Ireland five centuries or so later, when we are able to some extent to discriminate history from legend, the political and social organisation is similar, with some peculiarities due to difference of development. The chief difference appears in the matter of the kingly office which is universal. The republican form of government is unknown. The land is divided into a number of petty states or provinces, each governed by a Rí or king, with a supreme king, Ardrí, over the whole. The term king is in fact very lavishly

[1] This corresponds exactly to the position of supreme leader occupied by Calgacus among the Caledonians in the second half of the first century. *Inter plures duces virtute et genere præstans.* Tacitus makes no mention of a king among the Caledonians; they had nobles.

[2] Fustel de Coulanges, "Histoire des Institutions Politiques de l'ancienne France," i. 1-22.

bestowed, for each tribe or *tuath*, and every association of tribes or *Mórtuath* has its sub-king. The tribe is the social and political unit. Originally the land seems to have been held in common by all its free members.[3] But in the early historic, as distinguished from the remote legendary period, personal property in land as well as movables had developed. This transformation had taken place by the time that the ancient Irish laws, known as the Brehon laws, had taken shape. These laws were so termed after the Brehon or lawyer class, which had developed into a sort of hereditary caste and whose office it was to declare the local custom and apply it in cases brought before the Brehon.[4] These decisions, along with the old customs on which they were based, are said in the preface to them to have been revised and set forth in the first half of the fifth century A.D. after Laeghaire, king of Ireland, had been, if not converted, at least favourably disposed to Christianity by St Patrick. What was incompatible with Christian teaching was eliminated. The modern editors of the "Senchus Mor," the name applied to this compilation, accept the story as substantially correct,[5] and though it contains additions which are manifestly of later date, there is no reason to doubt that it represents to a certain extent the system of tribal law regulating the life of the people as early as the fifth century.

At the head of the *tuath* [6] was the Rí, or king, who, as leader in war, was also known as the Tóisech or captain, though the function might on occasion be held by a separate person. Next to the king there had developed a class of wealthier landowners who were termed *Flaith* or nobles, and formed a territorial aristocracy within the tribe in contrast to the ordinary freemen or grade of the *Féine* or Féni. Though all noble, they were graded in rank accord-

[3] But see note at the end of this chapter.

[4] "Ancient Laws of Ireland," Introduction, iv. 40.

[5] Introductions to i. and ii.

[6] Originally the *tuath* designated the people of the tribe; later it came to signify the territory occupied by it. In reference to the people composing the tribe the term Cenél came to be used; Welsh, Cenedl; modern Gaelic, Cineal.

ing to the extent of their land and the number of their tenants. These proprietors tended to increase their estates by appropriating other portions of the tribal land, with the result that what they did not retain in their own hands they let to freemen of the tribe for whom the available common land had become insufficient and who became their tenants, paying rent in kind and rendering certain services. The method by which this was done was by giving stock on certain conditions to the tenant, and these conditions determined his status according as the proprietor contributed only part of the stock or the whole of it. In the former case the tenant (*Saer Céile*)—whose obligation was the lesser of the two, inasmuch as he possessed some stock of his own—was free, and was only bound to pay in return the value of a third part of the stock annually for seven years, whilst still liable to pay a tribute in kind and render certain services, such as assisting to build a fort or dun, going on "hostings" (war service), and reaping the proprietor's harvest In the latter case the tenant who was a poor man and possessed no stock of his own, was a bond tenant (*Daer Céile*), and was obliged to give security for the return of all stock given him and pay a food tribute twice a year. He was also liable to give work and war service, and was besides bound to lodge and maintain the proprietor and his retinue for a certain period when he chose to visit him. In both cases the relation was based on contract, involved mutual obligation, and was safeguarded against the arbitrary action of the proprietor as well as delinquency on the part of the tenant. It involved a certain dependence on the proprietor on the part of both classes of tenants, and gave him a certain number of retainers more or less under his control, according to the degree of dependence, which was greater in the case of the *Daer* than the *Saer* tenant. The poverty of the former obliged him to take stock on more onerous terms from the proprietor, and by doing so he lost some of his rights as a freeman, though his status was not a wholly servile one. The tenure is not, in fact, to be regarded in the light of later feudal institutions, and was similar to the *metayer* system in France and Italy, under which the

proprietor supplies the stock, land, and utensils, the tenant the labour.[7]

The proprietor might further grant his waste land to "strangers" (*Fuidhir*), broken men of other tribes who sought a settlement on his land, who were tenants at will, and who, after a certain period of residence, could not leave it. They became practically *adscripti glebæ*, serfs. Among the unfree were also reckoned the class of poor tribesmen who, though belonging to the tribe, had no share of the tribeland and maintained themselves as herdsmen, labourers, or squatters on waste land (*Bothach*, *Sencleithe*). To this servile class also belonged those who had lost their freedom by misfortune, such as debt, and those captured in war.

What remained over of the common land which had thus been appropriated as the personal property of the wealthier members of the tribe continued to be held in common by the freemen, who appear from the Brehon laws to have constituted the larger proportion of the people living on the land.[8] The arable part of the common land was assigned annually or at stated intervals to them in lots for cultivation,[9] whilst the remainder, consisting of pasture and waste, was used as common. The ancient Irish community was one in which agriculture and the rearing of cattle was the main industry, though the various crafts connected with it were also in operation and have their place in the laws.

Within the tribe there were groups of families claiming to be descended from the same ancestor, consisting of septs and clans under their sub-chiefs, the former term being applied to the smaller, the latter to the larger subdivisions. The political unit was, however, not the sept or clan, but the tribe within which these subdivisions seem to have developed with the rise of individual property in land. It was, however, not an independent unit, but part of a larger unit, the *Mórtuath*, the great tribe or association of several tribes

[7] Introduction to "Ancient Laws," ii. 48, 49; Joyce, "Social History of Ancient Ireland," i. 188 f.

[8] Joyce, i. 187.

[9] This view has recently been contested by Professor MacNeill. See Note at end of chapter.

under a king known as the Rí-Mórtuath. Several of these great tribes in turn formed a province under a provincial king, and the association of these provinces constituted the kingdom under the *Ardrí*, or supreme king. The kingship was thus common to the fourfold territorial division, and the constitution of the tribe represented in miniature that of the larger divisions. The kingship of whatever grade was elective, the right of election being confined to the landed class. But it was so far hereditary that it was limited to the members of a certain family, the election falling on the member deemed the best fitted to govern, who might be the brother, nephew, cousin, or even more distant relative of the ruling king. To provide against the contingency of his death—a contingency frequently to be reckoned with in a turbulent age—a successor or tanist (second in authority) was often elected during his life.[10] In selecting the king or his successor the electors were to have respect to his physical fitness, his ability to defend his subjects, his character, his wealth, his rank, and his wisdom and experience of affairs.[11] He was bound to govern in accordance with the old customs and with the advice of the chief men. He was inaugurated on the stone reserved for this purpose, taking oath to rule justly, and receiving a white wand as the symbol of authority. In the inauguration ceremony the Druids in the pagan period, the Christian clergy in Christian times took part along with the chiefs. He might be deposed for failure to discharge his duty or because of personal defect, and, in respect of the restriction of his powers, we might call him a limited ruler. He was entitled to maintenance in his office, and for this purpose a portion of the land was set apart as mensal land, and subsidies of various kinds were paid him by his subjects. Each sub-king was subject to the king above him, and owed him tribute and service in war. He was also entitled to maintenance during his visitations of his subjects, and was liable to give hostages for his loyalty to the king above him. He maintained

[10] See Note at end of chapter. In spite of this turbulence, however, the average generation, as given in authentic genealogies, works out at about thirty-three years.

[11] "Ancient Laws," i. 73, ii. 279, iii. 85.

a number of officials and retainers, such as the house steward, the master of the stables, the brehon or judge, the bard, etc., and the higher the grade, the more numerous were they.

This system of graded authority might seem well adapted to secure order and good government throughout the land, each king and his subjects being bound in allegiance to the king above him, with the supreme king at the summit of the hierarchy as the embodiment of the national or central authority. In reality the system was more theoretic than effective, and only operated very imperfectly. The power of the supreme king over the provincial kings was usually but nominal, and this was largely true in the case of the relation of the lesser kings to those above them. There was no effective government of the country as a whole, which was too often the prey of strife and disorder. The conception of the State never really took root in Ireland. There was no sovereign authority competent to embody such a conception in general legislation and administration. This has often been ascribed to the Celtic lack of political capacity. As a matter of fact, it was due to the system of divided authority rather than to the racial peculiarity adduced, and in Anglo-Saxon England during the same period—supposed to have been superior to Celtic Ireland in this respect—the anarchy and disorder were hardly less apparent.

Whilst government devolved on the king in association with the chief men, the administration of justice was in the hands of the Brehons, or experts in the laws. There was no legislative body in ancient Ireland, inasmuch as there was no real central authority to enact laws for the whole kingdom. There were occasional assemblies to discuss and decide matters of general or local interest. But the Brehon laws contain nothing of the nature of statute law. They consist merely of customary law and the precedents on which the Brehons based their judgments in civil and criminal cases. There was a system of Courts or meetings for the trial of suits and the discussion and decision of a variety of matters, and these Courts ranged from the local assembly up to the general assembly or Convention of Tara, in which affairs of national importance were discussed and decided.

Over these Courts a member of the higher classes presided, and the rank of the president corresponded to the grade of the Court.[12] One of the Brehons acted as judge, others as advocates for the contending parties, and judgment could only be given after these pleadings had been heard. The evidence of two witnesses at least was necessary to establish a proof, but whilst a chief could give evidence against his *Daer* tenant or a freeman against a serf, neither of the latter was allowed to rebut the evidence of the former.

In ancient custom the principle of justice was based on the right of the individual to exact reparation for wrong done against person or property. The wrong was not considered in the light of an offence against the State, which, in the modern sense, did not exist, but against the individual, who could retaliate at will. If a person was murdered, his kinsmen had the right to kill the murderer. If the wrong was against property, the aggrieved party could make reprisals. This individual right was known as the law of retaliation, by which the individual was entitled to take revenge or exact redress as he was able. Gradually, however, especially under the influence of Christianity, the law of retaliation gave place to the law of compensation for injury to person or property. The initiative still lay with the individual, not with the State, and the individual might still exercise his right of direct retribution. But it became customary to proceed by less arbitrary methods, to act in accordance with a recognised procedure. This procedure consisted in referring the case to the arbitration of a Brehon, who heard the witnesses and the pleaders on behalf of their clients, and gave judgment in accordance with the customary law. If the wrong had reference to property and the offender refused to submit the case for trial or declined to pay the fine in accordance with the Brehon's judgment, the aggrieved party could proceed against him by distress, *i.e.*, seize his cattle or other goods after giving him due notice (Law of Distress). In the case of homicide or bodily injury, the fine was regulated in accordance with the nature of the offence (murder with or without intent, assault, etc.) and with the value set on the life of the person, which varied

[12] Joyce, i. 214-215.

according to rank (*éric*, *enechlann*,[13] honour price; Anglo-Saxon, *wergeld*). The circumstances attending the offence were also taken into account, and the exact amount to be paid was fixed by the Brehon. If the offender failed to pay, his kinsmen were liable for the fine. If they preferred they might surrender him to the family of the victim, which might then kill him or reduce him to slavery. Failing payment of the fine or surrender, the kinsmen were bound to expel him, and he then became an outlaw. If they failed to take the requisite alternative action, the family of the victim might lawfully kill him. A share of these fines for offences against person or property went to the *Flaith* or chief of the injured person, another to the tribal king, who derived a considerable part of his income from this source, another in payment of the Brehon's fee.[14]

We have spoken of the tribe and the sept, and the larger divisions composing the Irish kingdom. The smallest unit was the family. The rule was monogamy, and the dowry was provided by the bridegroom, not by the bride (the bride price). The woman in ancient Ireland held as high a position as the man. She could own property in her own right. The wife was on an equality with the husband, and no contract was valid without mutual consent. The marriage bond seems, however, not to have been a very strict one. Concubinage was common, the dissolution of marriage frequent. Illegitimate children were sold as slaves. A characteristic custom was that of fosterage, which prevailed among all ranks and was the conventional practice among the higher classes. In accordance with this custom, which was strictly regulated, the children were maintained and educated in another family, whose head undertook this duty either voluntarily (" for affection ") or in return for payment. The period of fosterage extended to seventeen years for boys, and fourteen for girls. The relation was a sacred one, and the foster son was bound to make provision for his foster father and mother in sickness and old age.

[13] From enech, face, hence " honour," and lann, a plate. In certain cases the injured person was entitled to receive a plate of gold the breadth of his face.—Watson.

[14] Joyce, i. 168 f., 198 f.; Skene, " Celtic Scotland," III, 151-153.

There are frequent references in early Irish literature to the Druids as an important and influential class. The term included generally the learned class—the lawyers, historians, and bards. In the more restricted sense it denoted those who were experts in magic, divination, astrology. They concerned themselves with religion and education, and, as the repositories of occult knowledge, were held in great reverence. They were, in fact, the chief advisers of kings. They were not identical in every respect with those of Gaul, and do not seem to have exercised the priestly function, or to have formed an organised body under a single head.

The system of organisation and government prevailing in ancient Ireland may reasonably be regarded as generally applying also in Britain north of the Clyde and Forth,[15] though allowance must be made for variety of custom due to difference of environment and historical development. In the case of the Scots who settled in Dalriada, there is reason to conclude that they transported across the sea the institutions of their homeland. In the case of the Picts who belonged to the same Celtic race, the conditions revealed in Adamnan's "Life of Columba," for instance, are, generally speaking, similar to those prevailing in Dalriada and Ireland. Moreover, the fact that the Scots, who ultimately became the dominating force in North Britain, succeeded in imposing their language and their customs on the Picts, points in the same direction. That they were able to do so constitutes in itself a strong argument in support of the general identity of race, language, and custom.

That the tribal organisation existed in North Britain in the Roman period we know from contemporary Greek and Latin sources. That these tribes were organised into larger divisions we know from the same testimony. We also learn from Tacitus that they had leaders in war, like Calgacus, who led the Caledonian army which opposed

[15] Giraldus Cambrensis, writing about the end of the twelfth century, explicitly says that the Scots of the northern part of Britain called Scotland were akin to the Irish in race, language, culture, and customs. See the passage in Anderson, "Early Sources of Scottish History," i. 1.

Agricola.[16] Solinus tells us that the people of the Southern Hebrides had a king who was not permitted to own property. Dio Cassius, on the other hand, says of the Caledonians and the Maiatae that the government was "democratic," though the term need not mean more than it meant in Gaul—the régime of certain privileged classes under an elected head. We learn, further, that the people lived by rearing cattle, fishing, and hunting, and there is archæological evidence that they practised agriculture to a certain extent, and were expert metal workers.

When we pass to the post-Roman period the native evidence, all too scanty though it be, enables us to improve upon these general, and to a certain extent hearsay, statements. As in Ireland, the tribe appears as the political and social unit. Dalriada was colonised by three tribes descended from the three brothers who led a colony of Scottish settlers thither—Fergus, Angus, and Loarn. These tribes were the Cenél Gabran, the grandson of Fergus, the Cenél Angus, the Cenél Loarn. The first occupied Kintyre, Cowal, Arran, and Bute; the second Islay and Jura; the third Lorn, as far north as Morvern.[17] Together they formed the little kingdom of Dalriada, of which Fergus was the first king, and which in extent was equivalent to hardly more than an Irish *Mórtuath*, or great tribe. The usual view is that Scottish Dalriada was a dependency of the king of Ireland, and that it obtained the recognition of its independence at the Council of Drumceatt in 574. It was, however, the Irish Dalriada that was in question at the Council. The people of this region of Ireland were apparently in close relation with their kinsmen in Kintyre, and threatened to separate from the Irish monarchy and attach themselves to Scottish Dalriada. It is possible that the latter laid claim to the Irish Dalriada. In any case it is an error to suppose that the negotiation at Drumceatt had reference to the independence of the little Scottish kingdom of Argyll, which owed no allegiance to the Irish king. It was concerned with the question of the relation of Irish Dalriada to the king of Ireland, on the one hand, and to Scottish Dalriada on the

[16] See note on p. 15.

[17] "Chrons. of P. and S.," 308-314; Skene, "Celtic Scotland," i. 229.

other.[18] The king at the time of Columba's arrival at Iona in 563 was Conall.[19] His successor was Aidan, and Columba's biographer tells us that the saint not only used his influence to bring about his election, but consecrated him to his office.[20] The tribal system was also, we learn from Adamnan and other ancient sources, in vogue in Pictland. The "Amra Coluimcilli" speaks of the saint as "the teacher of the tribes around the Tay."[21] Other references to these tribal divisions occur in this ancient tract which is ascribed to Dallan Forgail, his contemporary.[22] Another source, the "Book of Deer," contains memoranda in Gaelic of grants of land actually made to the saint and his companion Drostan, as well as others made by much later benefactors, including David I. Though these Gaelic memoranda were written in the twelfth century, it seems probable that the scribe was recording a true tradition, and if so the memoranda point to the existence not only of single tribes (*tuaths*), but of an aggregation of tribes (Mórtuath) in Buchan in the north-east of Pictland, which forms one of the divisions of modern Aberdeenshire.[23] Adamnan mentions larger divisions which he calls provinces (*provinciæ*),[24] and the "Pictish Chronicle" speaks of Nechtan as "king of all the provinces of the Picts."[25] From the same source we learn that these provinces were seven in number, which legend derived from the names of the seven sons of the first Pictish king,[26] in accordance with the legendary method of explaining the names of such subdivisions of the later kingdom. Finally, we know from Adamnan that in Columba's time there was a Pictish kingdom which was evidently coextensive with the whole region north of the Forth outside the little Scottish state of Dalriada, and included Orkney.

The territorial organisation of North Britain in the

[18] Professor Watson. See also Anderson, "Early Sources of Scottish History," i. 81 f.

[19] Adamnan, "Vita Columbae," i. 7. [20] *Ibid.*, iii. 6.

[21] Crowe, "The Amra," 29. [22] Pp. 33, 65, 71.

[23] "Book of Deer," ed. by Stuart, 91-93. The Latin text of the "Book of Deer" is of the ninth century.

[24] iii. 24. [25] "Chrons. of P. and S.," 6. [26] *Ibid.*, 4, 25.

second half of the sixth century was thus similar to that prevailing in Ireland. The same system of government appears also to have been in operation. In Adamnan we hear of king, sub-kings, and chiefs. The king at the commencement of Columba's mission in 563 was Brude, whose dun or royal residence was on the Ness, near the modern Inverness, and whose favour the saint succeeded in winning.[27] He evidently corresponded to the Irish Ardrí, or supreme ruler of Pictland, and mention is made of the chief of the Orkney Islands, who was sub-king (*regulus*) under him and whose hostages were in Brude's hands at the time of one of Columba's visits, as pledges of his good behaviour.[28] In Skye the saint baptizes the chief of "the Geona Cohort," [29] whose precise locality is not certainly known. The kingship is elective, and the Irish law of succession (tanistry) seems to have prevailed among the Scots at least. As in Ireland, the election is limited to the members of a certain family, the brother or other elder relative of the previous king being preferred to the son. Peculiar to the Picts is the custom that in case of dispute as to the eligibility of the male successor, descent through the mother, not the father, is the deciding factor.[30] This would seem to betoken a low view of marriage, though in Adamnan the marriage bond seems to be held in due respect, and there is no trace of the promiscuous relation of the sexes reported by Dion Cassius, who states, evidently from hearsay, that the men of a family had wives in common. Columba, in one instance, is found insisting on the Christian law of marriage,[31] and Christianity undoubtedly tended to invest the marriage bond with an enhanced sanctity.

We hear, further, of King Brude's councillors, consisting, it would seem, of those to whom Adamnan applies the terms *regulus*, *præpositus*, *primarius*, and of the Druids. One of these *reguli* is found visiting the king, and Broichan the Druid, Brude's foster father, evidently plays an important

[27] "Vita Col.," lib. ii. 36; "Chrons. of P. and S.," 7.
[28] "Vita Col.," ii. 43.
[29] *Ibid.*, i. 27.
[30] Bede, "Hist. Eccl.," i. 1.
[31] "Vita Col.," ii. 42.

part at the royal court.[32] There are also distinctions in rank in both Dalriada and Pictland—a noble class (*de nobili genere Pictorum*) rich in land and cattle in contrast to the ordinary peasant, who only possesses a few cattle and a limited amount of land. Like the king these nobles have their retainers [33] (*comites*), and the practice of fosterage is common. We hear of slaves—the captive Scottish girl, for instance, in the household of Broichan the Druid, from whom Columba in vain solicits her deliverance until a serious illness, from which the saint miraculously restores him, brings him to a more humane frame of mind.[34] Columba, indeed, is frequently found in touch with the very poor and plebeian class—there are beggars among them—who, if not actual slaves, appear to have been dependent on others.[35] The impression derived from the account of his mission among the Picts is that of a people whose institutions are similar to those of Columba's homeland, if its civilisation is in some respects more backward. They practise agriculture [36] as well as rear cattle, hunt, and fish. Whilst their king and chiefs live in hill forts, the peasants inhabit villages as well as separate homesteads.[37]

We learn nothing about the administration of justice. There is evidently no developed legal system, no professional lawyer class as in ancient Ireland, unless we assume that the Druids performed this function. There was, however, as late as the seventeenth century, a functionary in Lewis and other western islands termed the *Breive*, who seems to be the equivalent of the Brehon of the Irish laws. In a document belonging apparently to this century the " Breive " is described as " a kind of judge amongst the islanders who has an absolute judicatory, unto whose authority and censure the people willingly submit themselves, and never

[32] *Ibid.*, ii. 36; *cf.* 34 and 35. The term foster father may mean only that Broichan was the king's instructor and tutor. Similarly the saints are often called the *oide* (foster father) of those whom they trained in religion. The idea is that of the university *alumnus*. But Broichan may well have fostered him in the usual way. The two things are not inconsistent. Note by Professor Watson.

[33] *Ibid.*, ii. 3, 20, 21, 22, 24.

[34] *Ibid.*, ii. 34.

[35] *Ibid.*, ii. 20, 22, 23.

[36] *Ibid.*, ii. 3, 45.

[37] *Ibid.*, i. 28, 35.

appeal from his sentence when he determines any debatable question in controversy betwixt party and party." [38] Whether this functionary goes back to the Columban period is another question. But he appears to have been in existence 300 years before the document was written, and he is referred to as if the office was even then an ancient one. In a "History of the MacDonalds," attributed to Hugh MacDonald and also written in the seventeenth century, the author, referring to the fourteenth, tells us that "there was a judge in every Isle for the discussion of all controversies, who had lands from MacDonald for their trouble, and likewise the eleventh part of every action decided. But there might be still an appeal to the Council of the Isles." [39] Moreover, there is some reason to conclude (to judge from what is evidently a fragment of archaic law, known as the "Laws of the Bretts and Scots," in vogue among the Scots at least) that the law of compensation for offences against person and property and the system of the Honour Price of the individual prevailed in North Britain at an early period. The power of the king and the chief to maintain order does not, however, seem to have been very effective, for Adamnan has a good deal to tell of bands of marauders who plunder and murder the peasants and burn their homesteads. One of the chiefs of the royal tribe of Gabran, in Islay, is even found plying the trade of marauder as an ordinary vocation in spite of the reproof and ultimately the curse of the saint, whom he enrages by his mockery. Consequently he is finally engulfed with his plunder-laden boat in the waves between Mull and Coll as the result of the saint's imprecations.[40]

[38] "Highland Papers," ii., "Scot. History Soc.," xii., 2nd series, 266.

[39] "Highland Papers," i. 24, "Scot. Hist. Soc.," v., 2nd series. The charter of Angus, Master of the Isles, granted in 1485 by consent of his father and Council to the Abbot of Iona, is witnessed by Lachlan MacMurghaich (MacVurich) Archipoeta, Hullielmus Archi-judex, and Colin Fergusii (Ferguson), domini cancellarius.

[40] *Ibid.*, ii. 23.

Note to Chapter II

Since this chapter was written I have read the latest work on early Irish institutions—that of Professor MacNeill, entitled " Celtic Ireland," and published in 1921. Professor MacNeill agrees in many essentials with Mr Joyce and other writers from whom, checked to some extent by references to the Ancient Irish Laws, I have taken the substance of this chapter. He differs, however, in some important points from his predecessors, and his intimate knowledge of the ancient Irish language and literature entitles his contentions and conclusions to the serious consideration of the student. He starts his survey of Celtic Ireland in the first Christian century, though, as he points out, it is only in the time of St Patrick in the fifth that Irish history rests on a secure foundation. The supreme kingship of all Ireland arose, he thinks, in the interval between these two centuries. The *tuath* or tribe, on the other hand, is a very ancient institution. It is " the ruling fact of ancient Gaelic polity." It was ruled by its king, who was " the head of the assembly of freemen, their judge, and their immediate leader in war," though his place as war leader might be taken by a substitute, who was usually one of his sons, or a near kinsman. Besides the single *tuath* there were also aggregates of *tuaths* (the Mórtuath), with an over-king (Ruiri) over the sub-kings of the single tuaths composing these aggregates, who, unless members of the same family as the over-king, paid tribute to him. Towards the beginning of the Christian era there were five chief kingdoms, forming a pentarchy. But there was no supreme monarchy embracing all Ireland, which only came into existence later—in the centuries intervening between the first Christian century and the advent of St Patrick.

This outline of the political organisation of ancient Ireland, the basis of which was the tribe, agrees generally with that of Joyce and other writers, as far as the political organisation which ultimately evolved is concerned. He also agrees generally in his delineation of the social organisation, with its fundamental distinction between free and unfree, and the further distinction of status within the

ranks of the freemen. His delineation is largely based on the ancient law tract, called in English " The Small Primer," and printed in Vol. V. of the " Ancient Laws of Ireland." To the general body of freemen the term Nemed is applied, *i.e.*, those who alone enjoy the full franchise of the Irish Law. This Nemed class is subdivided into two divisions—the Soer or Saer, and the Doer or Daer Nemeds, the former being of higher status than the latter. These terms denote a higher and lower status among the freemen rather than a distinction between free and unfree. The distinction between the two is, he thinks, attributable to the Gaelic conquest of Ireland, the Soer Nemeds being the members of the conquering race, the Doer Nemeds the natives who served them in the various crafts. To the Soer Nemeds belonged in the historic period the churchmen, the rulers or nobles (Flaith), the professional class (Filid), and the Féni or general body of freemen (Féni being the archaic equivalent of the ordinary term Goidel or Gael). These four classes of Soer Nemeds were, theoretically at least, each divided into seven ranks, which are minutely specified in the ancient laws, though the division is more or less artificial. These ranks were, however, not absolutely static, for a person's rank did not in the ancient laws depend on the accident of his birth. It might increase or diminish according to circumstances. " A person may pass from a higher franchise to a lower, and vice versa. He can diminish his franchise by selling his land, or his vassal-following, or the service of his body. He can increase his franchise by purchasing land, or rights, or freedom, through his profession or his thrift, or the talent that God has given him. For it is a principle that ' a man is better than his birth ' " (p. 101).

To the Doer Nemeds, or inferior class of freemen, belonged the craftsmen, who might, however, by their skill rise to Soer status. At the bottom of the social scale were the unfree—serfs and slaves, who might also rise in status.

This delineation of the ancient Irish social organisation also agrees in the main with that of Joyce. Professor MacNeill objects, however, to the phrase " tribal or clan system," as applied to this organisation. He denies that

there was anything "tribal" in the *tuath* in the ordinary sense of the term tribe, *i.e.*, a community composed of those who are, or are supposed to be, of the same kindred. He cannot find in any ancient Irish document anything implying the idea of kinship or descent from a common ancestor as the factor constituting the *tuath*. The *tuath*, as it existed in ancient Ireland, was a political community, and was not based on the idea of kindred. It was a local association of people living in a definite district, bound together by common customs and interests, and ruled by a king. The idea of common descent did not enter into it at all. This idea, he thinks, is a mere imagination of modern writers. Moreover, its polity was "aristocratic, tempered by large exceptions, by variability of political status, and by the absence of hereditary barriers. . . . In general it appears that the Féni were all of equal potential nobility, the nobility of any individual being mainly determined by his wealth" (p. 111).

He further joins issue with Joyce and other writers on the question of the law of tanistry or succession as applied to the kingship, and contends that there is no evidence to show that the custom of electing a successor before the kingship became vacant was in operation before the thirteenth century. The kingship of all grades was, however, elective, and eligibility was usually limited to the descendants up to the fourth generation of one who had once been a king. Nor does he find any evidence that originally the land of the tribe was held in common—a theory which, he thinks, is wholly unfounded. There was individual property in land which could be granted, bequeathed, bought, and sold. He further denies the existence of the subdivisions of the tribe into septs and clans, which Joyce maintains. This he unceremoniously characterises as "rubbish" (p. 156). What he finds is the Fine in the sense of the family commune, consisting of the descendants of the living head of a family within the third or it might be even the fourth generation (*derbfine*), which held the family possession in common, though he only submits this as a hypothesis. Thus communal possession does exist within the tribe. Only it is not characteristic of the community at large, but of the

family in the large sense of several generations holding the family possession in common.

In these disputed matters it is not for one who is not an Irish scholar to hazard a judgment. It seems to me that this difference of opinion is due in part to the imperfect editing and translation of the ancient laws. The translation is sometimes incoherent, and fairly bamboozles the unsophisticated reader, who will heartily endorse Professor MacNeill's description of certain characteristic passages which he quotes as " an insane jargon."

CHAPTER III

THE EVIDENCE OF THE ANCIENT WELSH LAWS IN RELATION TO NORTH BRITAIN

In Strathclyde, the region between the Clyde and the Solway—the remnant of a larger state which extended southwards into Cumberland and beyond—the same system of organisation and government seems to have prevailed. In Ptolemy's time it was occupied by three tribes—the Novantae, the Selgovae, and the Dumnonii. These, we may reasonably infer, had perpetuated their existence during the imperial period, for the Roman occupation of the region between the walls was a precarious one compared with that of the region south of the Wall of Hadrian. In the upheaval caused by the invasions of the Picts and Scots they appear to have maintained their hold on this region, with the exception of its northern and southern fringe—Manaw and Galloway—where we ultimately find Pictish settlers.[1] They bore the brunt of the struggle with the invading Picts and Scots, and it was to this region that Cunedda, the founder of the Cymric kingdom, or rather petty kingdoms, in Wales under himself as supreme king (Gwledig), belonged.[2] In the long struggle with the Anglo-Saxon invader the northern Cymry, or Britons of Strathclyde, bore an active, if losing part, and ultimately they were cut off from the southern branch, or Welsh Britons, as the result of the battle of

[1] It is extremely doubtful whether the Galloway Picts were a settlement of Pictish invaders from beyond the Forth. The "Creenies" or Cruithnigh (Picts) of Galloway were most probably immigrants from among the Cruithnigh of Ulster, and their position among the Britons in Galloway appears to have been servile. Note by Professor Watson.

[2] Nennius, "Historia Britonum," Chap. 62. The Gwledig was the Cymric successor of the Roman Dux Britanniarum or upper Britain; Rhys, "Celtic Britain," 114 f.

Chester in 613.[3] Finally, their kingdom was reduced to the region between the Solway and the Clyde, with Alclyde, or Dumbarton, the fort of the Britons, as capital. In the middle of the fifth century it was under the supreme rule of Ceretic, the Coroticus to whom St Patrick addressed an epistle. In the second half of the sixth we find it under a number of kings or chiefs, whose names are mentioned by Nennius,[4] and who were engaged in warring not only against the Angles, but against each other. One of them, Rhydderch Hael, who emerges as victor in the battle of Arderydd in 573,[5] against his antagonist Gwendolen, is undoubtedly historic. He ruled at Alclyde in the time of Columba. But from the tenor of his message to the saint it would appear that his tenure of power was not very secure, for he is anxious to know what kind of death he will die, and his messenger tells Columba that his life is in constant jeopardy at the hands of his enemies in this region. We know from reliable sources little more of the nature of its social and political organisation than the fact that it was ruled by a king, whose government was very precarious owing to the restiveness of a number of sub-kings or heads of the tribes embraced within it.

Some light is, however, thrown on this organisation by the ancient Welsh laws. Though these laws were compiled under Howel the Good in the early tenth century, the institutions embodied in them were to a large extent in operation at an earlier period, and apply to the northern as well as to the southern branch of the Welsh people. These institutions resemble in the main those reflected in the Irish laws, with peculiar features due to the difference of historical influence and development. The groundwork, as in Ireland, is the tribal organisation of society. But it is not easy to get a clear conception of it, and even Welsh specialists have not succeeded in freeing it from obscurities.

[3] Mr Wade Evans contends, however, that there always was in this region a gap between the two, and that the connection between them was maintained by sea. "Welsh Mediæval Law," 43.

[4] Chap. 63.

[5] Incorrectly identified by Skene with Arthuret in Liddesdale, possibly Airdrie in Lanark.

The unit is the kindred (*cenedl*), for among the Cymry kinship dominated the communal life. The kindred seems to have corresponded to the Irish clan or sept, and consisted of those related up to the ninth degree, beyond which kindred ceased for the purpose for which the *cenedl* existed. The chief or head was known as the *pencenedl*, who held his office by election of the recognised members of the kindred, without restriction to any one family, and who with other subordinate officials was responsible for its defence and for the maintenance of justice and order within it. He was entitled to certain payments from the kindred—so much, for instance, for every woman who by marriage entered the kindred, and for every youth who came of age. A son born into the kindred was received into it or rejected by the formal declaration or denial of paternity by the reputed father, or by the chief of the kindred on his behalf. At fourteen he became of age—independent of his father's control—and was entitled to receive a share of the family goods and, if he chose, to occupy a homestead of his own on the family land and take part in its cultivation. He ranked as a *bonheddig*, a gentleman, or full member of the kindred. The age of majority for girls was twelve, but the girl, though entitled at this age to a share in the family goods, remained under the control of her father till her marriage. At marriage the father was bound to pay a fee to the chief of the kindred (*Amobr* or *Gobr Merch*, maiden fee). It seems to have been the custom to marry within the clan, to judge from the old saying, "to marry in the kin and fight the feud with the stranger." As in Ireland, the wife occupied a relatively high position, with a certain measure of control over the joint property of the household and protection against arbitrary divorce.

Within the kindred there were smaller kindreds, consisting of family groups (*Weles*), with a more restricted degree of relationship (to the fourth generation). The heads of these groups were the holders of the land belonging to the group, with rank and privileges superior to its members, who, whilst occupying separate homesteads and cultivating the land belonging to it (patrimony), only attained to a higher position by inheritance after the death of its head.

They were known as *Breyr* or Uchelwr (noble), and constituted a sort of aristocracy within the kindred in contrast to the ordinary *bonheddig* or freeman.

Besides this distinction of status within the kindred there was an inferior class of varying degree. The lowest of this class were the slaves (*caeth*), who were outside the kindred. They had no personal rights, and were the absolute property of their lords. Higher in the social scale, but still outside the kindred, was the stranger (*alltud*), the broken men of other kindreds, or the exiles from some other region, whom the landowner allowed to settle on his land in return for service and payments, and who in the fourth generation became his bond tenants, and could not leave their holdings (*Adscripti Glebæ*). In South Wales, however, these stranger bond tenants could, by marriage with a freewoman of the kindred, attain to the rank of a freeman within it. Another class of villein cultivators were the *aillts* or *taeogs*, who were born on the land (*nativi*), could not leave it, and if they took to flight forfeited their possessions to their lords.

Of these kindreds the various Cymric states in Wales were composed. Welsh scholars speak of them as tribes. But the Cymric kindred seems to have been a smaller unit than the Irish *tuath*, and corresponded rather to the Irish sept or clan, and the word tribe does not appear to have been applied in Wales to any unit corresponding to the Irish tribe. The word is not found, in fact, in the Welsh laws.[6] The kindreds in the aggregate made up, not a tribe, but a people or *patria*, of which there were a number in Wales such as Gwynedd, Powis, Dyved, Morgannwg. They might be compared with the provinces of Ireland, though in a more restricted sense. At the head of each was a king,[7] and over all was the supreme king of Gwynedd with his royal residence at Aberffraw, in North Wales.[8] These kings seem in the early period at least to have succeeded

[6] Wade Evans, "Welsh Mediæval Law," 55.

[7] *Brenhin*, high one, or *Arglwydd*, lord; more rarely *Tywysog*, captain; Gaelic Tóisech.

[8] He claimed the supremacy as a descendant in a direct line from Cunedda. Rhys, "Celtic Britain," 118 f.

by election and, as in Ireland, the tanist or successor (*edling*) was elected in the lifetime of the reigning king. The practice of fosterage was in vogue in the case of the children of kings as well as of their subjects. They derived a revenue from the fines imposed on criminals; from the fees for settlement on the unclaimed waste land within their dominions; from the movable property of those who died without children; from the tributes in kind which every subject, bond and free alike, was bound to pay for the king's maintenance; from their demesne lands which were cultivated by their bond tenants. They were attended by a number of officers—the judge of the royal court, the court priest, the bard, the captain of the guard, the steward, the chamberlain, the *maer* or administrative officer of a district, who collected the royal dues, received a proportion of them, and had charge of the king's waste lands, the *canghellor* (chancellor), who held the king's pleas within the district, and shared with the *maer* the charge of the king's waste lands.[9]

The land of these *patrias* or states was divided for economic and administrative purposes into smaller and larger divisions known as *trefs* and *cantrefs*. The *tref* consisted of several renders (*rhandor*), each of 312 erws, or Welsh acres, and the homesteads might form hamlets, village communities, or might be scattered over the land. The villein *tref* was usually a village community, the free *tref* a number of households spread over the area included in it. The *cantref* or larger division, though literally meaning 100 *trefs*, appears to have varied in extent.[10] It formed the chief unit of government and administration. Its court was composed of the qualified landholders (*uchelwr*) of the region, who represented all the freemen in it. It was presided over by the king or his representative, and dealt with all disputes arising among the freemen. The procedure in civil suits resembled that of the Irish court, with its judge or

[9] The list of royal officials in the laws is a very elaborate one, and Messrs Rhys and Brynmor Jones think that this part of the code is of late origin and was imitated from the Frankish system or perhaps from that of Athelstane. "Welsh People," 187.

[10] It seems originally to have been equivalent to the later Cymwd or commote. Lloyd, "History of Wales," i. 301-302.

judges, who heard the witnesses and pleaders, and decided cases in accordance with the nature of the evidence and the law relating to it. It dealt with criminal as well as civil suits. As in Ireland, the principle that regulated the criminal trial was that of compensation for violence to person or property, in accordance with the value (*galanas*, *wergeld*) at which the individual was rated, which had taken the place of that of private vengeance. As in Ireland, too, failing the full payment of the *galanas*, or fine imposed by the court for murder, theft, or other crime, the right of private vengeance still held good. The procedure in such cases was by way of oath, the accused person being required not only to rebut the charge on oath, but to find a number of persons prepared to swear to his innocence (*rhaith*), to which the name of compurgation came later to be applied.

This, roughly outlined, is the type of institution which we may infer prevailed among the northern Cymry as well as among the southern—in Strathclyde as well as Wales. We get a few details from the Epistle of St Patrick to Coroticus or Ceretic and from Gildas, tending to confirm this conclusion. From the former source we learn that about the middle of the fifth century Strathclyde was ruled by a king Coroticus or Ceretic who, though tinctured with Roman civilisation and perhaps a nominal Christian, was a tyrant and a freebooter, and, in alliance with " Scots and apostate Picts," had raided Ireland and carried off among his captives a number of Christian Irish girls. St Patrick asks that the Epistle may be read in the presence of the assembly or council of the people (plebs), and the wrong done by the ruffianly king and his associates amended.[11] Evidently the tribe itself is credited with the right to see justice done in the assembly of the people. Gildas was a native of Strathclyde,[12] and as he wrote his " Destruction of Britain " about the middle of the sixth century, he is a witness of the first rank for the conditions prevailing

[11] See the Epistle in Haddan and Stubbs, " Councils and Eccles. Documents," ii. 314 f.

[12] According to the monk of Rhuis, who wrote his life, he was born in Arecluta, the valley of the Clyde.

among the Britons at this period. Unfortunately his work is that of a moralist pure and simple, and as he was a fervid monk, he is concerned only with denouncing the evils of his time, which he paints in the darkest colours. Though most of the kings he mentions seem to belong to the southern Cymry, his description applies to the northern part as well, including the region in which he was born. Despite the demoralisation against which he inveighs at large, these petty states have definite institutions. They have kings and judges and courts of justice—a system of government and administration. The kings are tyrants, the judges corrupt. Yet the law is vigorously administered against common criminals at least, who fill the gaols, if there is the most scandalous maladministration of justice in the case of the higher classes, and the part of it which consists in testifying on oath is violated by false swearing, perjury.[13]

His contemporary, Kentigern, who evangelised in Strathclyde in the second half of the sixth century, had, unfortunately, no Adamnan to record his life, and his biography by Joceline, a monk of Furness in the twelfth century, was written 600 years later. It is a rhetorical effusion, in the conventional style of the mediæval hagiologist, of very limited historical value. The author drew, however, on an older work written in the Scotic language (Gaelic, *stilo Scotico*), and has preserved some ancient traditions. Rhydderch Hael, the patron of Kentigern, is a historic figure. Morken, to whom he also gives the title of king, is mentioned by Nennius, and seems to have been one of the sub-kings or chiefs in the district in which Kentigern's establishment was located, on the Molendinar stream (the modern Glasgow), and to which Gildas also belonged. Another chief, Morthec, is probably also authentic. The impression we gather from what seems authentic tradition is that of a kingdom extending southwards into Cumberland, over which a supreme king, Rhydderch, holds sway at Alclyde, with chiefs ruling over particular districts, corresponding to the modern shires or portions of them,

[13] *Crebro jurantes, sed perjurantes*, "De Excidio Britanniæ," Chap. 27.

such as Kyle, Carrick, Cunningham, in Ayrshire. "Kyle with the adjacent regions" (*Cyil cum aliis regionibus*) is mentioned by the continuator of Bede in the year 750,[14] and in the "Inquisition" made by Prince David of Strathclyde in the beginning of the twelfth century, mention is made of the various provinces of Cumbria[15] in ancient times. Another of these districts, Hoddam in Annandale, is noted in the biography as, for a time, the seat of Kentigern's episcopate. In the "Inquisition" a number of lands are mentioned as anciently belonging to the church of the diocese, which was coextensive with the kingdom, and they are scattered over the shires of Lanark, Peebles, Roxburgh, Selkirk, and Dumfries. These uncouth Celtic place names evidently go back to ancient times, and argue a territorial organisation on the Welsh model.

With this meagre picture we must be content, for references to the subsequent history of this region in the "Inquisition" are couched in very general terms. Beyond the facts that Kentigern had a number of episcopal successors, that the region was devastated by invading Picts, Scots, and Angles, and that the traces of his labours were almost obliterated, it throws no light on its institutional history for the next 500 years. But there exists a short code of what appears to be the ancient law of the Britons of Strathclyde in the "Laws of the Bretts and Scots," a compilation which is attributed to David I., who was Prince of Strathclyde before he became king of all Scotland. In this compilation the word *Cro*, denoting the value or honour price of the individual of each class mentioned, is given as the equivalent of the Gaelic *Enauch* and the Welsh or British *Gallnes*—the *Galanas* of the Welsh laws. Here there is a tangible proof of the application of the system of compensation of the Welsh laws in ancient Strathclyde. Here, too, the reflection of the social grades corresponding to those prevailing among the Cymry from the king down to the villein (*Rusticus*).[16] Moreover, in another fragment

[14] "Hist. Eccl.," i. 362, Plummer's edition.
[15] *Singulis Cumbriæ Provinciis.*
[16] "Acts of the Parliament of Scotland," i. 663-665.

of ancient Scottish law (*Assisa terræ Scotiæ*) we light on the *Merchet* or maiden fee (*mercheta*), payable to a lord on the marriage of a daughter of his dependant. The *Merchet* is the *Amobr* or *Gobermerch* of the Welsh laws, the fee payable to her lord by the father of the maiden on her marriage.[17]

[17] "Acts of Parliament," i. 640.

CHAPTER IV

THE EVIDENCE OF THE ANCIENT ANGLO-SAXON LAWS IN RELATION TO NORTH BRITAIN

We have still to take account of the institutions of the south-eastern region of what ultimately became Scotland. This region, embracing the modern counties of Berwick, Roxburgh, Peebles, Selkirk, and the Lothians, formed at the end of the sixth century the northern area of the kingdom of Northumbria, consisting of the former petty states of Bernicia and Deira, and extending from the Humber to the Forth. The Anglic colonisation of this area was very important for the future development of Scotland, inasmuch as the English language, and with it the English influence, were destined slowly to extend their sway westwards to the Firth of Clyde and northwards to the Moray Firth, and ultimately to dominate the whole of the Scottish Lowlands in contrast to the Highlands lying beyond the Grampian line. This culmination still lay in the distant future, for more than a thousand years were to elapse before Lowland Scotland in this wider sense was Anglified.

The process of ultimate Anglification is assumed to have been the result of two factors—the displacement of the original British population of south-eastern Scotland by a purely Anglic one, and the substitution of Anglic for Celtic institutions over the wider area within which the English language and influence ultimately prevailed. The assumption in both cases is, however, open to criticism. The theory of the elimination of the Britons by the Anglo-Saxon invader, championed by Mr Freeman and others, has been seriously shaken. The documentary evidence that the invaders systematically slaughtered the native British population who did not succeed in escaping to the western mountainous

region of Britain is very slight. The evidence of language is by no means conclusive. The predominance of a language does not necessarily involve such an extreme theory. We know, for instance, that the Gaelic ultimately displaced the Pictish language north of the Clyde and Forth in the early middle age without very serious displacement of the Pictish population. Moreover, the Anglo-Saxon laws clearly show the presence of a " Welsh " element (*Wealas*) in the population of the Anglo-Saxon kingdoms, and these references are sufficiently numerous to warrant the conclusion that this element was not a merely exceptional survival. We have not, indeed, a series of Teutonic " Dooms " or laws for Northumbria as for Kent and Wessex. But these laws are regarded by competent authorities as generally reflecting the customary law of the whole of Anglo-Saxon Britain after the settlement of the various Teutonic tribes from the Channel to the Forth. In regard to the south-east of Scotland in particular, the place names are extensively Celtic, and here, as farther south, the probability is that there was an absorption of the native inhabitants on a considerable scale. From the economic point of view, it was the interest of the invaders to reduce rather than exterminate the possessors of the soil, to make use of their services as dependants and slaves. It is evident that they did so in the southern regions, which were transformed into the kingdoms of Kent and Wessex, and there is no reason to conclude that they acted otherwise in the land north of the Humber (North-humbra-land). There is, in fact, no need to assume that the " Welsh-men " were entirely reduced to a slavish condition, for in the laws some of these " Welshmen " are found owning considerable tracts of land. The extermination theory may therefore be safely discarded.

Nor is it safe to assume, in the second place, that Celtic institutions were ultimately displaced in Lowland Scotland in the wider sense by those of the Anglic invader of the south-east corner of it. They were at most only modified by Anglic influence. What strikes the student on turning from the perusal of the Irish and Welsh laws to those of Ethelbert, Ine, and Alfred is the general similarity of the ancient Celtic and Anglo-Saxon customary law. So striking

is the affinity between the two that it has been contended that the Anglo-Saxons borrowed the substance of these early "Dooms" from the British Celt. The contention is unnecessary, and it would be hazardous to try to prove, on the ground of this affinity, that there was any substantial borrowing on the one side or the other. The affinity is due, not to such borrowing, but to the fact that both Celt and Saxon are the descendants of a common primitive stock to which the term Aryan is applied, and that their customs substantially preserved the trace of this common origin. In the main the direct affinity of early Anglo-Saxon law is with the ancient Germanic law—with that of the Teutonic folk, from whose midst the invaders emigrated.[1] At the same time the general resemblance between Celtic and Anglo-Saxon institutions in Britain is indubitable, and the resemblance in many points is so remarkable that we are warranted in concluding that it is a case not of two radically divergent, but of two kindred stages of social organisation brought into contact with each other. The fact of this institutional affinity cannot really be gainsaid in the face of the evidence afforded by the extant customary law of both races in the early mediæval age. "There are," remark Pollock and Maitland, "many points of real organic connection between Celtic and English law even if there has been no borrowing from the Welshmen on the Englishman's part."[2] It is therefore inaccurate to assume that, because the language of the English invader ultimately extended its sway over the greater part of mediæval Celtic Scotland, there was a displacement of Celtic by Anglo-Saxon institutions within the area affected by it. There was at most only a modification, and up to the end of the eleventh century there was not so much difference between the two sets of institutions prevailing north and south of the Forth—in Anglic Lothian and Celtic Alba, or, as it later came to be called, Scotland. In respect of general social and political conditions—class distinctions, land tenure, the principle and method of justice, the system of government, for instance—

[1] Pollock and Maitland, "History of English Law," i., Introduction, 29-30.

[2] *Ibid.*, p. 29.

the institutions of both reveal in a striking degree much in common.

Among the Angles, as among the Celts, there is the same basic distinction between the free and the unfree. This distinction appears in the laws of Ethelbert of Kent towards the end of the sixth century, and those of Hlothaere and Wihtraed about 100 years later. It is equally characteristic of those of Ine of Wessex, the contemporary of the latter, and of Alfred at the end of the ninth century. To the freemen belong the *eorl* and the *ceorl* of these early Kentish laws,[3] in contradistinction to the unfree. The freemen were, originally at least, those who held land independently of another, and thus enjoyed the full rights belonging to a member of the folk. To the unfree belonged those who were more or less tributary dependants of the freemen, and who are designated *Laets*[4] in the early laws (the *Liti* of the Germanic tribes, as described by Tacitus). Though they were probably largely composed of the native British (*Wealhs*), a proportion of them may have accompanied the invaders from the Teutonic homeland. To this dependent class belonged those who had lost their freedom by reason of their crimes or of their poverty. Lower in status were the slaves[5] (*theow*, *esne*), who had no rights and were treated as part of the property of their masters. The slave, like the *Laet*, was thus not exclusively a native Briton. Not only might the free member of his folk forfeit his freedom for various reasons. Slavery was a recognised institution among the Germanic tribes, and it is quite probable that the invaders brought their slaves with them, and that those of their descendants who were not emancipated remained in a slavish condition. The old theory that the invaders were all freemen, and their dependants and slaves conquered Britons, cannot be maintained on the face of the evidence of the Anglo-Saxon "Dooms." Slavery was an Anglo-Saxon as well as a Celtic institution, and the slave trade is frequently mentioned in these "Dooms."

There was gradation of rank among both the free and the unfree classes, and this gradation is expressed by the

[3] Ethelbert, 13, 14, 15, 16.
[4] *Ibid.*, 26. [5] *Ibid.*, 11, 16.

difference in the value of the individual life and in the penalties payable for certain offences. It is also expressed by the amount of land held. Among the freemen the *eorl* occupies a higher rank than the *ceorl* or ordinary freeman. His wergeld is three times that of the latter.[6] The penalties for offences against him are double of those payable in the case of the ordinary freeman.[7] There was, however, no hard and fast demarcation between these classes of freemen, for the *ceorl* might, by increasing his holding in the land or by special service to the king, rise to the rank of the *eorl*. On the other hand, there appears in the laws of Ine and Alfred a tendency to limit the independence of the freeman, to reduce him to the position of the dependant or client of a lord (*hlaforde*) who grants him protection, and for this protection he is liable to render certain services or payments.[8] There was a process of social lapse as well as social rise within the class of the common freemen. There appears, too, in these laws a class of *Gesiths*—followers, retainers of great landowners who occupy a position superior to that of the ordinary freemen; who follow their lord in war; who are liable to a penalty to their lords double that of the freeman.[9] Such a retainer of a lord may be a landowner, or he may not, and the penalties paid vary accordingly. But even in the latter case the penalty is double that of the ordinary freeman.[10] Mention is also made of a class of king's *thegns*,[11] who rank next to the *ealdormen*, and higher than the retainers of a lord.[12] The king's *thegns* belonged to the class of royal *Gesiths* or retainers (the Anglo-Saxon equivalent of the *comites* of Tacitus), the officers of the royal household (*ministri*), and the title of "thane" ultimately displaced that of *Gesith* as the designation of this important class. The wergeld of the thane was six times that of the common freeman, and it seems that he might be the owner of from six to twelve hides of land.[13] Above the *thegn* was the *ealdorman*, another important official whose rank is denoted by a higher penalty in case of

[6] Hlothaere, 1, 3.
[7] Ethelbert, 13, 14, 15.
[8] Ine, 3, 39; Alfred, 37.
[9] Wihtraed, 5; Ine, 45, 50.
[10] Ine, 51.
[11] Wihtraed, 20.
[12] Ine, 45.
[13] Pollock and Maitland, "History of English Law," i. 10-11.

any offence against him, and stands next to that of the bishop.[14]

This gradation of rank extends also to the unfree, whether *Laets* or slaves. The wergeld of the former varies from eighty to forty shillings, according to rank,[15] whilst the penalties against slaves of higher or lower position run from fifty to twelve shillings, payable to their lords.[16] The slave might rise in status by means of manumission,[17] though he appears to have remained the dependant of his lord, and if he left the land without his permission, his family remained slaves. On the other hand, there appears to have been some legal recognition even of the slave as against his lord, for a slave who works on Sunday by his master's orders becomes a freeman.[18]

The system of early Anglo-Saxon land tenure is rather obscure. The earliest Anglo-Saxon charters do not go beyond the seventh century, and it is difficult to obtain definite information from the early laws. Students of Anglo-Saxon economic history accordingly differ considerably in their conclusions, owing to this obscurity of the subject. According to Mr Seebohm, the invaders adopted the system of the Roman villa—the later English manor—with its *coloni* and slaves, who cultivated the land for its owner. The " hams " and " tuns " of the Teutonic settlers, of which the early laws make mention,[19] were thus not village communities, but the estates of proprietors which were cultivated by their dependants, consisting of the native British (*Wealhs*) or the *Laets* whom the invaders brought with them. He is further of opinion that this was the system prevailing in ancient Germany, and that in adopting the manorial system in ancient Britain, they were following at the same time the custom of their homeland. " However many exceptional instances there may have been of settlements in tribal households, or even free village communities, it seems to be almost certain that these ' hams ' and ' tuns ' were, generally speaking, and for the most part from the first, practically *manors* with communities in *serfdom* upon them." [20] This

[14] Ine, 45.
[15] Ethelbert, 26.
[16] *Ibid.*, 10. 11.
[17] Wihtraed, 8.
[18] Ine, 3.
[19] Ethelbert, 3, 5, 13, 17.
[20] Seebohm, " The English Village Community," 423.

theory has not been generally accepted. Professor Vinogradoff, for instance, maintains that these "hams" and "tuns" were not individual estates, but communities of free settlers. He thinks that these communities consisted at first of settlers belonging to the same kindred (*Maegth*), resembling to some extent the Welsh kindred, though it does not seem to have been so definitely organised in septs or clans as in the Celtic laws. It played an important part in the corporate life of the people—the payment of wergeld and other penalties, "oath helping" or compurgation, inheritance, land settlement. Though the tendency was towards the substitution of other relationships for that of kindred, "there are many facts which point to an increasing solidarity of grouping (by kin) in proportion as we get back to earlier times." [21] These facts "point to a state of society where the people, though not so neatly divided into *gwelys* or clans as with the Welsh, still settled closely enough together to maintain the idea of solidarity of wide groups constructed on the basis of far-reaching genealogical reckonings. . . . The *Maegth* were recognised associations for social purposes of all kinds, and not indefinite numbers of relatives like our modern Smiths and Browns." [22]

The settlement of the invaders was thus, it would seem, carried out on the principle of the allotment to the kindred or joint family resembling the Welsh kindred or *gwely*.[23] These settlers were located for the purpose of cultivation and defence in villages ("hams" and "tuns")—Coldingham, Tyningham, Haddington, Winton, to mention some examples from ancient Lothian—though there might be within the area of the township separate homesteads and hamlets, which belonged to it as an administrative unit. The members of the community held the land in certain shares of various size; the pasture and waste in common. Though the freemen were entitled to a certain share of the land, they were not free to cultivate these shares at will, but were under regulations applicable to all the cultivators of the community. They were bound to observe a three years' system of rotation by which a proportion of the arable

[21] Vinogradoff, "Growth of the Manor," 136.
[22] *Ibid.*, 137. [23] *Ibid.*, 140-141.

land was put under cultivation for two successive years, and the third year allowed to lie fallow (the Three Field System). The Two Field System—crop and fallow alternately—was also in vogue in some regions. Moreover, the share of each proprietor was not contiguous, but was scattered in strips over the whole arable area. These strips were, further, not fenced off from those of their neighbour, but open (the Open Field System), being separated only by narrow borders of turf (*balks*). The whole was enclosed by a common fence in order to prevent damage to the crops by cattle, and for the portion of the fence enclosing the ends of his strip from the pasture or the waste land, the cultivator of these strips was held responsible under penalty of making good the damage done through his neglect to the crops of others.[24] Whilst the individual strips were cultivated on the open system, the freeman's homestead was enclosed by a hedge,[25] and if he neglected to keep the hedge intact, he could not claim for any damage done by a neighbour's beast.[26] The normal holding of an ordinary freeman in the early period seems to have been what was called a hide, supposed to be equivalent to 120 acres, though there is dispute as to its exact extent, which varied according as the word was used in a fiscal or an agricultural sense.[27] In such cases he would make use of servile labour in the cultivation of his share (the *Laets* or slaves of the early laws). The *ceorl* might indeed prosper into the ownership of more than one hide, and, as the result of this prosperity, to *eorl* rank. On the other hand, as the result of accumulated inheritance of heirs of the same family, his share of the land might and did decrease to certain proportions of a hide—to a bovate or oxgang equivalent to fifteen acres, or the eighth part of a hide, a virgate (yardland), equal to thirty acres, or the fourth part of a hide. Nay, he might by crime or misfortune lose his share in the land altogether, and become a servile cultivator.

The land thus held by the free members of the village community was known as Folkland—land which was held by the customary right of the free folk and independently

[24] Ine, 42.
[25] Ethelbert, 27, 28; Ine, 48.
[26] Ine, 40.
[27] Vinogradoff, 151 f.

of any lord,[28] and subject only to military service in the *Fyrd* or army and certain public burdens.

Besides the free village community, the holding of land in dependence on a lord or patron was also in operation from an early period. The distinction of rank among the freemen would tend towards the creation of larger holdings for the *eorl*, as compared with the *ceorl*. The king's *gesiths* or personal retainers were rewarded with large estates, whilst gifts of land were made to the Church. In this way larger tracts came into the possession of the higher classes and the ecclesiastics than the hide or part of a hide owned by the ordinary freeman.

Land obtained by special grant from the king or other magnate was known as Bocland (Bookland)[29]—land held by written title or charter in contrast to land held by folk right or customary law. There is evidence that such bookland was in existence from the period of the introduction of Christianity, *i.e.*, the beginning of the seventh century.[30] These charters usually convey to the grantee the free and entire fruition of the land, along with the woods, waters, and game, with the right to common pasture and felling of trees in the common woodlands. They enable him to gift it and dispose of it at will. They grant in addition certain privileges, such as jurisdiction in the case of certain offences (*Sac* and *Soc*—cause and suit) and certain immunities from the tribute payable to the king, from tolls, etc., whilst reserving the obligation to repair bridges and fortifications and to render military service. Certain penalties or sanctions are prescribed in the case of the non-fulfilment of the conditions on which the land is granted. In addition to Bookland, there was what is termed Laen or Loanland—land leased to a tenant temporarily in return for rent or service without passing out of the possession of the lessor.

The possession of large estates by individuals or ecclesiastics tended inevitably to develop the system of dependent

[28] The conception of folkland as public land belonging to the State has been discarded, folkland being now regarded as land held by folk-law or custom.

[29] Alfred, 41.

[30] Kemble, "Codex Diplomaticus Aevi Saxonici," Introduction, 7.

land tenure, known as the manorial system. The large landowners had more land than they could cultivate for themselves by servile labour. They were in a position to afford protection to those willing to settle on their estates and become their dependants, and in those unsettled, anarchic times, in the face of the hostility of the native Britons and the oft-recurring feuds between these petty states, the number of such was an increasing one. Moreover, these grants by charter might come to include the lands of the free village community which would thereby be transferred from folkland into bookland, and its free inhabitants become the dependants of a lord. Theoretically, folkland might not be capable of alienation, because each holding in it was regarded as a family rather than an individual possession. Practically a great deal of it did come to be alienated from its original purpose, and passed into the hands of a lord. The consequence was to increase the number of those who, in virtue of this development of the manorial system, lost their status as freemen as far as the free possession of the land was concerned, and sank to the position of dependent peasants (*geneat*, *gebur*, villein), paying rent in kind (*gafol*, tribute), and rendering service to the lord. Traces of this system are already apparent in the laws of Ine, in which the freeman is found working for a lord (*hlaford*), and mention is made of the *gebur*.[31] Similarly, in one of the laws of Alfred we hear of those who desire to leave one manor (*Boldgetal*) to seek a lord in another.[32]

The principle and method of justice are similar to those of Celtic custom. The principle is that of compensation for wrongs done to person or property; the method that of "oath helping" or compurgation, though the latter term was not in use till a later time. The Anglo-Saxon, like the Celtic peoples, have passed beyond the stage when the law of private retaliation was the prevailing one.

The introduction of the principle is ascribed by Alfred to the Church.[33] It seems, however, to have been in operation among the Germanic tribes before the introduction of Christianity. But it was not necessarily observed, for the

[31] Ine, 3, 2; 6, 3; *cf.* 63. [32] Alfred, 37; and 37, 1.
[33] *Ibid.*, 49, 7.

central authority, the power of the State, was weak among the early Anglo-Saxons as among the Celts, and the individual was apt to take the law into his own hands. The laws direct what ought to be done in the case of the offences specified, rather than ensure that it shall be done in virtue of any coactive power behind them. The right of retaliation is, in fact, still recognised in certain eventualities.[34] For treason to one's lord no atonement by compensation is possible.[35] A thief caught in the act might be killed on the spot.[36] Likewise an adulterer *in flagrante delicto.*

At the same time the influence of Christianity was evidently beginning to make itself felt in the direction of moderating the tendency to take the law into one's own hands and of strengthening the sense of moral obligation. Several of the laws of Wihtraed have for their expressed object the maintenance of the Christian moral order,[37] and a large section of those of Alfred enact the Ten Commandments and the Mosaic civil law contained in the Book of Exodus, as modified by Christian precept. This doubtless indicates a real attempt to bring Christian influence to bear on the national life. Whilst, for instance, marriage by purchase of the wife is the recognised practice, the wife has recognised rights, and adultery is a serious crime.[38] Even so, this legislation reflects clearly enough the type of an archaic society difficult to keep in order, prone to quarrel and decide a quarrel in accordance with "fist right"[39]—a society in which homicide, wounding, cattle stealing, sexual offences are rife enough. The more powerful are prone to protect their followers from the consequences of outrage inflicted on others in defiance of the law, and justice is sometimes difficult to obtain from the shire and other officials.[40] Fighting in the houses of the various classes from the king downwards, and even in the assembly of the people, was evidently common enough.[41] Compensation itself, based as it was on consideration of rank and status, not on the equal right of the individual to justice, is a very

[34] Alfred, 42, 1-7.
[35] *Ibid*, 49, 7.
[36] Wihtraed, 25; Ine, 35.
[37] *Ibid.*, 3 f.
[38] Ethelbert, 31, 77-80.
[39] Ine, 9.
[40] Ine, Prologue and 8.
[41] Ethelbert, 1; Ine, 6, 1-3.

rudimentary principle of law. But such as it was, it was an advance on the indiscriminate right of private revenge. As among the Celts, it was based on the value of the individual assessed in accordance with his social standing. The distinctive term applied to it, corresponding to the Celtic honour price, is *Wergeld* in the case of offences against the individual, whilst *Wite* is used in the case of offences against public order. Another term *Bot* (the modern German *Busse*) is applied indiscriminately to compensation of any kind.[42] The tariff is a very minute one. It covers in the laws, besides homicide, injuries to any part of the body. So much for a nose, so much for an ear, a finger, a toe, and so forth.[43] As in Celtic custom, it concerns not only the aggrieved person, but his kindred,[44] for the wrong done to him is a wrong done to them, and the compensation payable for its perpetration accordingly affects them as well. In the case of slaves and dependants, the master is involved, the master being required to make or receive compensation, as the case may be.[45] In certain cases the king comes in for a share.[46] Similarly in the case of public offences, in which the *Wite* is payable to him or to some public authority.

As among the Celts, the method of procedure is by oath. The accused person is required to appear in the court of the Hundred,[47] or the Shire, and clear himself of the alleged offence by oath. He must, moreover, find a sufficient number of persons (the number varying according to rank) to swear their belief in his innocence ("oath helpers"). If he fails to find the proper number of compurgators, he was compelled, in order to prove his innocence, to submit to some form of ordeal, such as carrying a hot iron or placing the hand in boiling water.[48] Ordeal by battle seems not to have been an early Anglo-Saxon practice. In some cases he may lose the right to clear himself by oath.[49] If

[42] Pollock and Maitland, i. 26.
[43] Ethelbert, 32.
[44] *Ibid.*, 20, 21.
[45] *Ibid.*, 86, 87; Hlothaere, 1, 3.
[46] Hlothaere, 11-14; Wihtraed, 9.
[47] In the early laws only the shire-moot is mentioned.
[48] Pollock and Maitland, i. 15-16, 29.
[49] Ine, 15, 2.

he refuses to appear for justice or declines to make amends according to custom, he becomes an "outlaw against the people" (not against the king, the offence not being regarded as an offence against the State, but against the individual and the community), a public enemy, and may be killed with impunity. A fugitive from justice who has committed a crime worthy of death might, however, take sanctuary for seven nights in certain churches, as in Ireland, during which the pursuer could not remove him on pain of fine for breaking the king's protection and Christ's peace.[50] The right and duty of initiating procedure lies with the aggrieved party, who, if he cannot bring the delinquent to make amends in the usual form, may, if he is strong enough, besiege him in his house and compel his surrender. If not strong enough he may appeal to the king or the *ealdorman* for aid. If the delinquent refuse to surrender, he may fight him.[51]

The system of government prevailing among the Anglo-Saxons, as among the Celts, was monarchic. The invaders were, indeed, led not by kings, but by captains, leaders of war bands (*Heretoga*, *Ealdormen*), and in their homeland, as among the Gauls, kings were unknown among them. But they adopted the kingship as the result of conquest, and ultimately these petty states appear as kingdoms. In some of them in the earliest period there was frequently more than one king—in some cases three or four. The tendency was, however, to reduce the number of kingdoms and consolidate the kingly power in those which survived in one hand. The title of king thus came to be much more restricted than among the Irish and Welsh Celts. The king was supposed to be a descendant of Woden, and genealogies were spun to prove the assumption. As among the Celts, he seems to have succeeded by election from among the members of the royal stock, though the practice of election has recently been disputed.[52] He might be deposed if he proved unworthy of office, and was frequently dispossessed

[50] Alfred, 5; *cf.* Ine, 5. [51] *Ibid.*, 42.

[52] Chadwick, "Anglo-Saxon Institutions," 354 f.; Liebermann, in a still more recent work, maintains that the practice admits of no doubt. "National Assembly in the Anglo-Saxon period," 55.

by violence in the early period. Of the fifteen kings of Northumbria in the eighth century, thirteen are recorded to have lost their office by resignation, murder, or expulsion. Similar examples are not lacking in the history of Wessex.

The instability of the royal power is, in fact, as prominent in Anglo-Saxon as in Celtic history. Nor was there, for several hundred years, more real national unity in Anglo-Saxon Britain than in Celtic Ireland or Wales, though the king of one state might for a time attain to something like supremacy over the others. The tendency was, indeed, towards a national unity of a more organic kind than that which prevailed in Ireland under its *Ardri* or supreme sovereigns. But it took a long time to reach it, and its accomplishment was not the result of any innate genius for government, but of the pressure of the Danish invasions and the unifying influence of the Church.[53] The progress towards unity between the Picts and Scots was more expeditious among the Celts north of the Forth than among the Anglo-Saxons south of it, though in the north, as in the south, anything like organic unity was a slow process. On the other hand, it may be said that, compared with the Irish or Welsh kingdom, the Anglo-Saxon State developed from an early time, in the Witan or national assembly and in the lower courts of the shire and the hundred, legislative and administrative organs more effective for the purpose of a political society than anything of a similar character in Welsh or Irish history. Even if the idea of the State, and with it the central authority as represented by the king, was weak among the Anglo-Saxons, the system of government was, at least in form, more organic and afforded the machinery for effective government under a strong and capable ruler, such as appears occasionally now in one kingdom, now in another.

The Witan was not, except perhaps in the very early period, a democratic body. If it ever represented the whole body of the freemen of lower as well as higher degree, it ere long ceased to do so. Bishop Stubbs, followed by Dr

[53] Hodgkin, "Political History of England," i. 179.

Liebermann,[54] and unlike Mr Freeman,[55] sees in it a select, non-representative body, composed of the ealdormen, prelates, and comites, or companions of the king, who did not represent, though they acted in behalf of the nation, and whose numbers increased as the union of the kingdoms proceeded. The Witan seems to have been selected, not elected. Whether representative or not, this assembly was originally, and for long, invested with ample powers, though it must be remembered that those powers varied with the character of the king, and that they rested on custom rather than on any definite constitution. Its co-operation in legislation and government was, however, a real one, if this might be greater under a weak king than under a strong one.[56] The laws were decreed by its counsel and consent. We know from Bede that the laws of Ethelbert of Kent were so enacted,[57] and we know from the laws of Wihtraed, Ine, Alfred, and others that these were also so enacted. We know further from Bede that under Aedwin of Northumbria it legislated the adoption of Christianity in place of paganism.[58] We know in addition from the charters that enactment by consent was the established practice. Before the end of the seventh century it had taken root in all the Anglo-Saxon states. By this time the Witan was composed of the higher class of these states, and was no longer, if indeed it ever had been, the assembly of all the freemen.[59] It legislated for the Church as well as for the nation, and the higher clergy formed an important constituent of it. It is at times, in fact, indistinguishable from the ecclesiastical synod.[60] Its consent is necessary to the alienation by the king of the folkland. It is the supreme court in civil and criminal causes. It imposes taxes on extraordinary occasions—in cases, that is, in which the revenue of the royal and public lands was insufficient to meet the emergency, say, of a Danish invasion. It declares war

[54] "National Assembly," 5.
[55] "Growth of the English Constitution," 52.
[56] Liebermann, *ibid.*, 25-26.
[57] "Hist. Eccl.," ii. 5. [58] *Ibid.*, ii. 13.
[59] Liebermann, 5.
[60] Liebermann, *ibid.*, 30, 32, 51.

and makes treaties. It disposes of the army and the fleet. It fills the high offices in Church and State. It elects the king as well as the bishops and the ealdormen, and deposes these when necessity arises. Theoretically and actually the royal dignity was doubtless a high one. The king is the representative of the people. He is consecrated to his office with the rites of religion. In reality he possesses originally very little power. His action is controlled by the great Council in comprehensive fashion. As thus controlled the early Anglo-Saxon king was evidently a much less august person than the contemporary imitations of the Roman Emperor who ruled in Frankish Gaul. Whilst it would be absurd to see in this Anglo-Saxon polity a full-fledged democracy of freemen, as some of the English historians have done, it undoubtedly represents a limited monarchy. "As a rule," says Dr Liebermann, "the form of the Anglo-Saxon monarchy may be described as monarchy limited by the Witan's consent." [61] It is rather a practical aristocracy under a monarchic form, for the Witan, which represents the higher classes, both secular and ecclesiastical, is a powerful factor in legislation, policy, and administration.

This aristocracy is, however, compatible with a system of local government which deprives it in turn of the powers of an oppressive oligarchy and leaves room for the operation of the popular will in what concerns it most nearly—local administration. The freeman has his share in the local administration through a series of courts, corresponding to the political subdivisions of the State, in which he makes his voice heard personally or by representative. These subdivisions consist of the township, the hundred, the shire, each of which has its distinctive court and administrative officials, though the hundred does not appear in the laws till a later period. The township, if composed of freemen, has its *Gemot*, or what we should call its "Parish Council," which elects its *tungerefa*, town reeve, or headman, and its four representatives to the larger courts, and makes its own by-laws. If dependent on a lord of the manor, it was probably administered by its superior or his steward.

[61] Liebermann, 23.

According to Pollock and Maitland, "We have no ground whatever for concluding that the township-moot (court) had any properly judicial functions." [62] Above the township came the larger political division of the hundred, with its *Gerefa*, or hundred reeve, and its monthly court or hundred-moot at which the landowners of the district and the representatives of the townships met to dispense justice in civil and criminal causes. Larger than the hundred was the shire, which was under the jurisdiction of the ealdorman, elected by the Witan, and the shire reeve, or sheriff, nominated by the king. The ealdorman was the commander of its militia, the sheriff the administrator of the law, who presided over the shire-moot or folk-moot, as the court of this larger area was called. The bishop also had a seat in this court, which was held twice a year and was attended by representatives of the hundred and townships.

The early Anglo-Saxon constitution did not remain stationary throughout the five centuries of Anglo-Saxon history. It underwent modification in some material points. More especially did the power of the king increase, and this increase of power reacted on the political and social organisation of the nation. The change from a number of petty states to one kingdom, under a monarch whose sway extended from the Tweed to the Channel, made the king a far more powerful person, territorially, than a petty ruler of Kent, Mercia, and Northumbria. The predominance of one king over the others was expressed from an early period by the title of *Bretwalda*. When in course of time there came to be but one ruler over the whole of Anglo-Saxon territory, the increase of his territorial power found expression in the high-sounding title of *Imperator*, *Basileus* of all Britain, which, nominally at least, placed him on a level with the imperial potentates of east and west.

Not only did his territorial power increase; his relation to the nation likewise underwent a change. He was not merely the head of the tribe or petty state; he became its lord and was protected by a rigorous treason law. To plot against the king was to incur forfeiture of life and goods.

[62] "History of English Law," i. 19.

The Church enhanced his dignity by the emphasis on obedience as a religious duty. The king continues to legislate by the counsel and consent of the Witan, but the Witan tends to become a royal rather than a national council. His official functions are amplified. He becomes the source of justice, the guardian of the peace. The breach of the peace, the transgression of the law, is an offence against the king. He is the supreme judge in all causes, and his officers consequently encroach on the powers of the local courts. He is, moreover, the grand landowner. The folkland becomes the king's land, and is practically undistinguishable from the royal domain.

The *Gesith* of earlier times, the *comes*, companion who fights for him, resides at his court, and is rewarded with a grant of land, by-and-by develops into the *Thegn*, the noble landowner, the vassal. The nobility of blood and tradition gives place to an official and territorial nobility, the *eorl* to the *thegn*. This nobility has various grades, and ultimately the earl, whose title is borrowed, not from the old *eorl*, but from the Danish *jarl*, appears as the highest in rank. This nobility is not, however, a feudal caste, as on the Continent, for even the *ceorl* and the merchant may prosper to *thegn* right. The tendency is, nevertheless, in the direction of feudalism. The king is the universal lord (theoretically, at least). The great landowners who hold estates of him and owe him military service, have jurisdiction over the lower landowners, and by the time of Edward the Confessor a large number of small freemen have, by commendation, placed themselves in dependence on a lord. And while the relation of inferior to superior is still a personal one, it tends to become a relation based on land tenure, and has thus something in it of the feudal tie.

The Anglo-Saxon institutions thus outlined were those prevailing in Anglic Lothian between the Forth and the Tweed. They had taken root during the period from the late sixth to the eleventh century in what ultimately became part of mediæval Scotland, and the inhabitants of this region retained their laws and customs after its conquest by Malcolm II. in 1018. These laws and customs, though modified by the later feudal system, thereby materially

contributed to the constitution of the Scottish kingdom in the larger sense. This contribution was intensified by the English influence resulting from the influx of Englishmen from the south, which began in the reign of Malcolm Canmore, and from his marriage with the English Princess Margaret, from which sprang a line of Anglo-Scottish kings.

There are, however, traces of somewhat similar institutional conditions in Celtic Scotland from the seventh to the end of the eleventh century, and it is necessary to examine this all too obscure period in order to elucidate these as far as our meagre sources enable us to do so.

CHAPTER V

THE CELTIC MONARCHY IN NORTH BRITAIN FROM THE SEVENTH TO THE ELEVENTH CENTURY

DURING the 500 years from the seventh to the end of the eleventh century, the general framework of the political and social organisation of the various components of what at the end of it had become the Scottish kingdom in the large sense was, we may say, much of a piece. Unfortunately the actual evidence in the form of reliable documents, apart from the questionable testimony of later chronicles, is very meagre. We have only scraps of information at the best. For Scotland as a whole we have no series of customary laws as in the case of the Irish, the Welsh, the Anglo-Saxons. No history like that of Bede for the Anglo-Saxon states, and no chronicle like the Anglo-Saxon, though the "Pictish Chronicle" is valuable as far as it goes. Nevertheless, there must have been a body of customary law regulating the life of the people of these northern regions, which may reasonably be held to have resembled those which are extant for the other Celtic and also the Anglo-Saxon peoples. That this body of customary law existed is, however, more than a mere inference. There is evidence of the fact in the repeated references to the ancient laws of the land in the legislation ascribed to David I. ("Assisæ Regis David") in the first half of the twelfth century. Mention is made of the pre-existing "law of the kingdom" (*assisa regni*), "the law and custom of Scotland" (*lex et mos in Scotia*).[1] The later chronicles know of "laws and statutes" enacted by early fabulous Scottish kings.[2] But this ancient

[1] "Assisæ Regis," 7, 10, 15, 17, 20; "Acts of Parliament of Scotland," i. 319 f.

[2] Fordun, ii. 12; Boece, iii. 12.

legislation is merely one of the commonplaces of later patriotic credulity, and no reliance can be placed on such statements. More credence may be given to the references to early law-making in the tenth-century "Pictish Chronicle." It speaks of "the rights and laws" (*jura ac leges*) of King Aedh of Dalriada in the eighth century, which King Donald, the successor of Kenneth MacAlpin, and the Scots (*Goideli*) re-enacted in the ninth century for the Scoto-Pictish kingdom.[3] A later chronicle attributes to Kenneth MacAlpin the laws existing in Scotland in the thirteenth century.[4] But this is purely a case of reading present history into the past. Kenneth seems, however, to have carried out one important piece of legislation in the introduction of the episcopal form of government into the Pictish Church in place of the old monastic rule which had prevailed from the time of Columba. In his reign the first bishop of Pictland or Fortrenn, Tuathal by name, whose episcopal seat was at Dunkeld, makes his appearance. He was evidently one of Kenneth's Scottish followers, and this innovation he carried out in the teeth of the opposition of the Pictish clergy, who regarded these Scottish clerics as intruders.[5] Grigg, or Girg, who ruled over Alba in the last quarter of the ninth century, also appears as an ecclesiastical legislator. Of him it is authentically recorded that "he first gave liberty to the Scottish Church (*Ecclesia Scoticana*), which till then was in servitude, according to the institution and custom of the Picts."[6] This was an important legislative act, recognising the Church of Alba as an institution possessing the right of self-government, free from the dependence on the crown in which it appears to have been placed under Pictish auspices.[7] In Constantine III., whose reign extended over nearly the first half of the tenth century, we have another authentic legislator. Of him the "Pictish Chronicle," written not long after his reign, tells us that he, along with Bishop

[3] "Chrons. of P. and S.," 8; Anderson, "Early Sources of Scottish History," i. 291.

[4] "Chrons. of P. and S.," 203.

[5] *Ibid.*, 8, 361.

[6] *Ibid.*, 151, ex consuetudine et more Pictorum.

[7] Anderson says that it perhaps refers to liberty from civil taxation ("Early Sources," i. 365). The explanation in the text is more likely.

Cellach, at the Moot-Hill, near the royal city of Scone, undertook "to protect the laws and discipline of the faith and the rights of the Churches—the Pictish equally with the Scottish." [8]

Whilst we have thus in documents of varying reliability references to ancient legislation, secular and ecclesiastical, there exists in the "Laws of the Bretts and Scots" [9] a summary of customary law which may be taken as reaching far back into these nebulous centuries. It is believed to have been enacted by David I.,[10] who was Prince of Strathclyde before he became King of Scotland, and represents the system of compensation for offences as it prevailed among his British subjects of Strathclyde and the Gaelic population north of the Forth and Clyde. From what we know of the ancient Celtic law of compensation, the system it represents might have been in operation in the seventh as well as in the twelfth century. It is given in Latin, Norman French, and Scots, and whilst the designation of the various classes are those of the early feudal period, the Celtic terms preserved in the document evidently go back to an earlier time. The crimes referred to are slaughter and wounding, and the *enach* or value of the individual, according to rank, is given.[11] The king is valued at 1000 "ky" (cows) or 3000 ounces of gold, his son at 140 cows, the earl (the later title for the Celtic mormaer) at the same number. The value of an earl's son or of a thane (the later name for the Celtic Tóisech) is 100 cows, of a thane's son 66 and two parts of

[8] "Chrons. of P. and S.," 9. Leges disciplinasque fidei atque iura ecclesiarum evangeliorumque pariter cum Scottis . . . devoverunt. *Pariter* is translated by Anderson "in conformity with (the custom of) the Scots" (i. 445). I prefer the translation given in the text.

[9] Leges inter Brettos et Scotos, "Acts of Parliament," i. 663 f. They are also preserved in the later fabrication known as the "Regiam Majestatem," which incorporates some fragments of ancient law. "Acts of Parliament," i. 640.

[10] Lawrie doubts whether it was enacted by David, but gives no reason for his conclusion.

[11] The terms *Cro* and *Kelchyn* are used to denote the value of the person in the case of slaughter. The term *Wergylt*—wergeld—occurs in a fragment of old law preserved in the laws of William the Lion. "Acts of Parliament," i. 375.

a cow, of a nephew of a thane and of the *Ogethearn*, who ranked below the thane, 44 cows and 21 pence and two parts of a penny. All below the last class rank as "carls" (*rustici*, *vilayn*) and are valued at 16 cows. The rate of every married woman is less by a third than that of her husband, and if unmarried as much as that of her brother. There is a similar descending tariff in the case of what is called *Kelchyn*, though the number of cows is smaller for each class. For wounding the head of an earl the penalty is 9 cows, of his son or a thane 6, the thane's son 3, his nephew 2 and two parts, the carl 1. Kinship plays an important part in this old customary law as in the laws of the Irish, Welsh, and Saxons. Part of the penalty in certain cases goes to the kindred.

Nothing is said of the method of obtaining redress or satisfying justice in such cases. But it is evident from the laws ascribed to David I. that the method of "oath helping" or compurgation, in vogue in his time, went far back beyond his reign. According to these laws, the accused, in order to purge himself from the charge, must not only aver his innocence on oath, but find a sufficient number of persons, varying according to the crime and the rank of the accused, ready to swear on his behalf.[12] It also formed part of the ancient custom of Galloway.[13] As in ancient times, summary justice might be done on a cattle thief caught in the act.[14] Trial by the ordeal of fire and water evidently also belonged to the ancient practice,[15] though there is no reliable evidence for trial by combat before the early part of the twelfth century.[16]

The "Laws of the Bretts and Scots" also throw some light on the jurisdiction at an earlier time of the higher class over those residing on their lands. It tells of "those slain in the peace of the king and other lords," and defines the penalties payable for such lawlessness to the king, the son of a king, an earl, an earl's son, a thane, and a thane's

[12] "Assisæ Reg. Dav.," c. 2, 7, 11, 16, 19.
[13] Antiquæ Leges Galwidiæ, "Acts of Parliament," i. 382.
[14] "Assisæ Reg. Wil.," c. 7, 15.
[15] *Ibid.*, 2, 12, 15.
[16] Neilson, "Trial by Combat," 75-76.

son or nephew. Breach of the king's peace by slaughter is rated at 180 cows, of that of his son or an earl at half the number, and in decreasing proportion down to the thane's nephew. These laws reflect also the social as well as the legal system of an earlier time. They reveal the distinction between the free and the unfree. A large proportion of the people, to which the terms *Rustici*, *Villein*, *Carl*, are applied, are in a state of dependence on a lord, and part of the compensation in the case of the slaying of the wife of a carl goes to the lord of the lands on which he dwells. In a fragment of ancient law preserved in the "Regiam Majestatem" we further learn that the Merchet or maiden fee paid to the lord, on the marriage of the daughter of a dependant, was 1 calf or 3 shillings if she was of servile status. If the daughter of a freeman, 1 cow and 6 shillings. If the daughter of the son of a thane or an *Ochethiern*, 2 cows or 12 shillings; whilst that of an earl's daughter was 12 cows.[17] In another fragment of old law preserved in those of William the Lion the distinction between the free and the servile classes is also noted.[18]

The later law relating to military service,[19] though referring to feudal usage, bears a striking resemblance to the custom prevailing at a much earlier time among the Celts. The obligation to serve in arms, to follow the summons of king or chief to war was one of immemorial antiquity. It is generally referred to in early Scottish charters as *Servitium Scoticanum*, and was of two kinds, denoted by the terms *Feacht* (expeditio) and *Sluaged* or *Hosting* (exercitus), the former covering service within the kingdom, the latter service beyond it. The earliest notice of this obligation occurs in a document referring to grants by Macbeth and his queen, about the middle of the eleventh century, of certain lands to the Culdees of Loch Leven free from the burden of service with the army of the king.[20] The burden was inherent in the possession of land, and in this connection the *Davoch*, which evidently goes back

[17] "Acts of Parliament," i. 640.
[18] Sive Liber, sive Servus, "Acts," i. 375.
[19] "Acts of Parliament," i. 398.
[20] Lawrie, "Early Scottish Charters," 6.

to ancient times, appears as the land measure conditioning it.[21]

To this early time belong also the dues or payments in kind known as *Can* or *Cain* and *Conveth*, mentioned in charters of the reign of David I. and the laws of William the Lion.[22] *Can* was a proportion of the produce—grain, cattle, pigs, and poultry—paid to the king by the holders of crown lands and by the dependants of a superior, and its antiquity is evidenced by the occurrence of it in the Irish and Welsh laws [23] and in the old law of Galloway. It long survived in the form of "cain fowls"—part of the rent paid by a tenant to his landlord. *Conveth* (the old Irish *Coindmed*, the Welsh *Dovraeth*) was a similar due derived from "the original right of the leaders of the tribe to be supported by their followers." [24] It came to mean a night's maintenance furnished by the occupiers of the land to the landowner when moving through it, and exigible four times a year. Later, in the case of the crown lands, it took the form of a payment in produce similar to the *Can*.

Of the machinery of the government during the Celtic period our knowledge is only general, and scanty enough at that. In the course of the period we light on evidence here and there of the existence of the township, the tribe, the province. The townships of Aberdour and Deer are mentioned in the memoranda in the "Book of Deer," written in the twelfth century, as existing in the time of Columba. In view of the evidence in Adamnan of the existence of villages or townships in Columba's time, there is no reason to conclude that the scribe was merely putting back to the sixth century the growth of a later time. The Gaelic word is *Cathair* or *Cathir*, a city (*civitas*). It would, of course, be absurd to read into this term its later signification.[25] But it may, I think, be taken as denoting a certain amount

[21] Skene, "Celtic Scotland," iii. 234-236.

[22] Lawrie, "Early Scottish Charters," 59, 81, 95; "Acts of Parliament," i. 398.

[23] The *Bestighi* of the Irish; the *Gwestva* of the Welsh laws, Skene, iii. 231.

[24] Skene, iii. 232.

[25] It may also mean a monastery, and in place names it is used for a stone fort.

of land occupied by a number of families dwelling in proximity to one another with common rights in the waste or pasturage. According to a "Tract on the Men of Alba," [26] referring to the organisation of the Scots of Dalriada, the Scottish population of this region was anciently grouped for sea expeditions into sections of twenty houses each. This does not necessarily imply that these twenties formed townships, with a common organisation. They may have been separate homesteads with no such separate organisation. But the grouping of them together for a common operation suggests some such unit, and from Adamnan, as we have already noted, we learn that there were villages and hamlets (*Vicus Viculus*) [27] scattered over Britain north of the Forth and Clyde. In the "Pictish Chronicle" a number of them gradually emerge into historic importance —Abernethy, Forteviot, Scone, Dunblane, Dunkeld, Dollar, Fordun, Brechin, Fetteresso, Dunedin (Edinburgh), to some of which the term *Civitas* or *Oppidum* (*Dun*) is applied. Some of them ultimately rose into the later burgh, which only emerges in the twelfth century. In the early charters which belong to the eleventh century, the township appears as the *villa*, and the first reference in these early charters is the notice of a grant by Macbeth and his queen of the villa of Kirkeness to the Church of St Serf at Loch Leven.[28] Henceforth the term frequently appears as a conventional designation of grants in the charters of David I. and others. By this time it denoted in an increasing degree a community in dependence on a lord. Towards the end of the eleventh century the township seems to be becoming the manor in North Britain as in late Anglo-Saxon England,[29] though the process was probably far from complete, and the free township seems still to have been a survival in the midst of this developing manorial system.

[26] "Chrons. of P. and S.," 308 f.; Anderson, "Early Sources," i., Introduction, 150 f. Skene dates it the fourteenth century. The lateness of the MS. makes one doubtful about using it as a source for a much earlier time; but it seems to describe an archaic condition of things.

[27] "Vita Col.," i. 28.

[28] "Early Scottish Charters," 6.

[29] On this mixture of manor and township in late Anglo-Saxon England, see Vinogradoff, "Growth of the Manor," 299 f.

The tribal organisation seems to have subsisted throughout the greater part of the period, and it survived in the Highlands and seemingly in Galloway, the later transformation wrought in the Lowlands by feudalism. As long as the *Tóisech* appears in evidence, the tribe, of which he seems to have been the leader, would maintain its existence as an administrative unit. The existence of the province as the next highest unit is sufficiently well attested. King Nechtan, the "Pictish Chronicle" tells us, was king of all the provinces of the Picts. The seven provinces figure in the early traditions preserved in the first part of the Chronicle, though the reputed origin of these from the seven sons of the first Pictish king is, as we have noted, purely fanciful. Several provinces are certainly mentioned by name in the course of the Chronicle—Angus, Moray, Mearns, Buchan, Athole. A later document, entitled "A Description of Scotland,"[30] which Skene attributes to the year 1165, and which incorporates legends of an earlier time, was written by one who informs us that he derived his information from Andrew, Bishop of Caithness in the middle of the twelfth century, and previously a monk of Dunfermline. The narrative is couched in accordance with the belief in the ancient division of the land into seven kingdoms by the seven sons of the first Pictish king, who are here spoken of as seven brothers. This is obviously a fiction to explain the fact of the territorial division of the land north of the Forth. But it undoubtedly points to the existence of these divisions at an early period. Each division consists of two parts or regions—a principal region (*regio*), and a sub-region (*sub regio*) attached to it. These are, in the order given by the writer, Angus with Mearns, Athole and Gowrie, Strathearn with Menteith, Fife with Fothreve (Kinross), Mar with Buchan, Moray and Ross, Caithness and Sutherland. The territory comprised in these divisions is thus equivalent to the old Pictish kingdom under its supreme king, as distinct from the old Scottish kingdom of Dalriada. Each of these principal divisions,

[30] De Situ Albaniæ, "Chrons. of P. and S.," 135-137; Anderson, "Early Sources," i., Introduction, 115-119.

we are further informed, originally formed a kingdom ruled by a king (*rex*), and each sub-region attached to it was under a sub-king (*regulus*). Nothing is said about a supreme king, the description being based on the assumption that originally there were seven kings in Pictland, in accordance with the belief that the origin of these seven divisions was due to the division of the land among seven brothers. This shows how much the writer was influenced by the legendary element in the current view of past history. But it does not invalidate the fact of some such territorial division of the old Pictish kingdom down to the amalgamation of Pictland and Dalriada. Such provincial kings under a supreme king appear, as we have noted, in Adamnan, though it is likely enough that the supreme king's authority over the magnates of these regions was not very effective. When the scribe goes on to describe the extent and the ancient boundaries of the regions, as existing at a later time and as communicated to him by the Bishop of Caithness, the place of Caithness as the seventh in the list is taken by Argyll. This part of the description evidently refers to the time after Dalriada had been incorporated into Alba as the result of Kenneth MacAlpin's accession to the Pictish throne, and after Caithness had been occupied by the Norsemen. Dalriada, under the name of Argyll,[31] is therefore substituted as the seventh province without any intimation of the reason for this substitution. Whilst the document is based on legendary assumptions, the fact that five of these provinces are mentioned by name in the "Pictish Chronicle," in connection with authentic events throughout the tenth century, shows that these divisions did exist at an early period.

Moreover, we obtain from this Chronicle confirmation of the further fact that they were under the government of territorial magnates, termed in the tenth century *Mormaers*. In the reign of Constantine in the first half of this century, Indrechtach, *Mormaer* of Angus, is noted. Again, Malcolm I., about the middle of the century, invades

[31] Argyll as used by the writer denoted a larger area than the ancient Dalriada. It extended up the west coast as far as Loch Broom in Rossshire.

Moray and slays Cellach, who appears to have been its *Mormaer*—a title which is applied to its rulers before the end of the century.[32] In the reign of Dubh (962-967), the *Satrap* of Athole, which seems to be the Latin equivalent for *Mormaer*, similarly comes to a violent end in one of the frequent internal conflicts between the reigning king and his rivals. For the *Mormaers* of Buchan and Mar we have the testimony of the memoranda in the "Book of Deer," and the scribe carries back the title to the time of Columba. Whether or not he was merely using a title with which he was familiar in his own time to denote those ancient territorial rulers, it is evident that this title was in use several centuries before he wrote, *i.e.*, about the middle of the twelfth century.[33] Connected with it is that of *Tóisech*, for the grants made to Columba by the *Mormaer*, Bede, who is also described as "the Pict," and the other subsequent grants mentioned are given "free from *Mormaer* and *Tóisech*," *i.e.*, from certain burdens on the land granted. The *Tóisech* or Captain, who, as we have seen, was the head of the tribe of a district, thus, like the *Mormaer*, goes far back into the Celtic period. We know, however, nothing very definite as to the function of either. The *Mormaer* evidently was the head of a province, the *Tóisech* of a district, to which they seem to have succeeded by the law of Tanistry prevailing in Pictland as in Ireland. As such they evidently had the right to certain dues on the land. Robertson thinks that they were also officials of the crown, the king's deputies responsible for the maintenance of order, the appearance of the people at the "hosting," and the collection of the royal tribute.[34] That they owed subjection to the king and exercised their authority to a certain extent in relation to him is a reasonable inference.[35] But what was the exact

[32] Skene, "Celtic Scotland," i. 375.

[33] Notices of various *Mormaers* of North Britain also appear in the Irish Annals of the eleventh century. See Anderson, "Early Sources," i. 407, 446, 480, 571.

[34] "Scotland under her Early Kings," i. 102-105.

[35] *Mormaer* literally means "sea-steward," from *mor*, sea, not *mōr*, great, and *maer*, an officer. The office appears to have been originally connected with coast defence. We have the phrase *Comes Littoris*,

nature of this relation and this authority we cannot definitely say. Judging from the analogy of Ireland, the relation between the supreme king and these territorial magnates was not a very organic one, and in North Britain they evidently were very restive subjects, often in conflict with the central power, and striving in some cases at least—that of Moray, for instance—to assert a virtual independence of this power.

The kingship throughout the Celtic period to the end of the eleventh century was evidently an unstable institution. There was recurring Norse and Danish invasion from the beginning of the ninth century, and frequent feuds over the succession. In addition to internal disorder there were attempts to conquer Saxon Lothian and British Strathclyde. Not a few of the successors of Kenneth MacAlpin, to go no farther back, perished in battle or by the hand of the assassin. These invasions and rivalries threatened at times to break up the kingdom of Alba and weakened the power of the crown. Of the fifteen successors of Kenneth, up to the beginning of the eleventh century, ten are said to have come to a violent end. Beyond the Grampians in the great province of Moray and even in that of Angus, south of these mountains, their authority was long very precarious. In the extreme north the Norse jarls held sway. As in Saxon England, the power of the crown for the time being depended on the character of the king who wore an uneasy diadem in "the royal city of Scone," as the "Pictish Chronicle" calls it. Two kings only in the tenth century—Constantine III. in the first half of it, and Kenneth II. towards its close—seem to have wielded an effective sway in the region between the Spey and the Forth. In the eleventh century the second and third Malcolms also belong to the category of strong rulers, and their united reigns extended over two-thirds of it. Even so, there was the

apparently the later equivalent of *Mormaer*, and the title *Mormaer* was later transformed into *Comes*, earl. *Maer* implies some higher authority, *i.e.*, the king, whose officer he was. It is a relative term and may mean any delegated office. It is sometimes convertible with *Tóisech*, which is also a relative term, meaning generally headman of any particular job as well as leader of the tribe.

Macbeth interlude, beginning and ending in civil war, between the two reigns. The mode of succession to the crown contributed to its instability. The Pictish law of succession through the female was discarded in the reign of Donald, the brother and successor of Kenneth MacAlpin, in favour of the Scottish Law of Tanistry, by which the crown passed, not to the son, but to the brother or other acceptable relative of the late king. Only after the death of the brother or other relative did the son become eligible. It was apt to produce friction among the available candidates, and explains the frequent contests for the crown on the occurrence of a vacancy. The kingship here, as among the Irish Celts, was attained in virtue of the right of election from among the members of the royal line, though this is not stated in the "Pictish Chronicle." It simply says that such and such a king "reigned" or "held the kingdom" for so many years. It does, however, mention the election of a king of Strathclyde in the early part of the tenth century, and the probability is that it is assumed in the case of the kingdom of Alba as well. This law of succession is said by Fordun to have lasted till the time of Malcolm II., who decreed that henceforth the crown should descend to the nearest relative of the king, whether a son, daughter, or niece.[36] Of such a decree nothing is otherwise known, and Fordun is no reliable authority for the Celtic period. But the accession of his grandson Duncan, for which he unscrupulously prepared the way, shows that he adopted this policy, against which the revolt of Macbeth was a reaction, and ultimately it became the established practice from the beginning of the twelfth century onwards.

There is some evidence that the general policy of the Scottish kings during this period was to extend their direct jurisdiction over the provinces ruled by the *Mormaers*, and to annex their territories to the crown. This policy seems to have met with determined opposition. But it gradually made headway in the hands of the more powerful kings like Kenneth II., Malcolm II., and Malcolm III. Kenneth seems to have asserted his authority over Angus by making

[36] Lib. iv. 1.

away with the heir to the Mormaership, whose mother Finella appears in tradition as the avenger of her son by the murder of the king. He certainly appears in the "Pictish Chronicle" as master of this territory, part of which "he gave to the Lord."[37] E. W. Robertson thinks that Malcolm II. annexed Mar and Buchan to the crown. But this is only a conjecture based on rather slender evidence.[38] Malcolm III. at last succeeded in asserting the royal authority over Moray, at least as far west as the Spey, whose *Mormaers* often defied it, and one of whom—in the person of Macbeth—had deprived his father Duncan of his crown and his life. Early in the twelfth century the *Mormaer* disappears in the earl, the *Tóisech* in the thane, under the southern influence which was already making itself felt in the reign of Malcolm and his Anglo-Saxon Queen, Margaret, and became so markedly formative in those of their sons. The *Mormaer* of Buchan and the *Tóisech* of the clan Morgain still appear in the memorandum of a grant to the Church in the reign of David I.[39]

The efficacy of the crown, derived from the personality of these rulers, may have owed something to the ecclesiastical influence which the Celtic kings seem to have enlisted on its side. The introduction of Christianity north of the Clyde and Forth by Columba and his fellow-missionaries tended to lend an increased prestige to the kingly office. King Aidan of Dalriada was consecrated by Columba to his office with the rites of religion, which invested it with a definite sacredness. The practice, we may reasonably infer, would henceforth be observed in Pictland when a Christian king was elected to the vacant throne. In these rough, barbarous times, with recurring internal feud and foreign invasion, we may not, indeed, ascribe much efficacy to the restraints of religion on human passion and violence. Nevertheless, the tendency of the Church was here, as we know that it was elsewhere, in the direction of emphasising

[37] "Chrons. of P. and S.," 10. Tribuit magnam civitatem Brechne Domino.

[38] "Scotland under her Early Kings," i. 99-100.

[39] "Book of Deer," 95.

the royal office as a divine institution.[40] The introduction by King Nechtan in the beginning of the eighth century of certain of the Roman, in place of the Celtic, usages, brought the Celtic Church into touch with the more developed organisation of the Church at large, though the assimilation does not seem to have affected very materially the Celtic Church, which is found in the time of Queen Margaret to have preserved many of its peculiar customs. The legend of the receipt of the relics of St Andrew in this century, though of very dubious historical worth, points in the same direction. In the middle of the next century another innovation—that of the episcopal system of government in place of the Scottish monastic system—followed. The Culdee religious establishments were monastic. But they seem to have acknowledged the episcopal jurisdiction, the first bishops of Alba being, in fact, Culdees.[41] At this time the first Bishop of Fortrenn, which seems to have been equivalent to Alba, emerges with Dunkeld as his episcopal seat, to which the ecclesiastical capital, along with the bones and other relics of Columba, had been transferred from Iona. The episcopal office in the matter of ordination, but without episcopal jurisdiction, existed in the monastic church of Columba and his successors at Iona. It seems also to have continued after the establishment of territorial episcopacy. But such bishops were titular rather than diocesan, and for long there was only one territorial bishop in Alba and the later Scotia. A late tradition records that his seat was ere long transferred from Dunkeld to Abernethy. But the tradition is too late to be worthy of credence, and the transference was, as far as we can judge, to St Andrews, where the Bishop of Alba, Cellach, appears as having his seat in the beginning of the tenth century. For the next two centuries the Bishop of Alba seems to have been sole bishop in the diocesan sense, his diocese being co-equal with the kingdom between the Forth and the Moray Firth. We get occasional glimpses during these centuries of the co-operation of king and bishop in ecclesiastical affairs, and

[40] Adamnan, "Vita Col.," i. 29.

[41] Robertson, i. 338; Stuart, "Book of Deer," 123-124.

this co-operation would appear to have been of some value in the work of governing what was at best but an unruly kingdom.

From Turgot we learn that the royal dignity in Malcolm the Third's time was much enhanced by Queen Margaret. She surrounded the king with a submissive nobility (*Proceres*), who formed his retinue when he rode abroad and held appointments in his service.[42] Among those appointed to the king's service mention is made of the chamberlain. In his reign the court acquired an unwonted splendour, and the ruins of the old palace of Dunfermline are still there to confirm Turgot's picture of royalty.

Of the royal government in this period we have little definite information. There are a few indications that the king ruled in co-operation with a council, and legislated in important matters as the result of deliberation with his councillors. King Brude, as we have noted, is represented by Adamnan as acting along with his council (*Senatus*)[43] on the occasion of Columba's first visit to his residence on the Ness. Nechtan, we are informed by Bede, decided early in the eighth century to adopt the Roman usages at an assembly of his nobles (*Optimates*) and many learned men (*Viri doctiores*).[44] King Donald, the brother of Kenneth MacAlpin, legislated along with the Goidel (Scottish) magnates at Forteviot the laws to be adopted for his kingdom.[45] King Constantine deliberated with Cellach, the Bishop of Alba, at what seems to have been a council at the Moot-Hill of Scone in the beginning of the tenth century.[46] Turgot speaks of several councils held in the reign of Malcolm III. at the end of the eleventh century to discuss and legislate the reform of the Church.[47] There is thus some evidence of occasional deliberations for the transaction of important affairs. But the evidence is so scanty that we may not assume that there was a corporate assembly, which might be regarded as the counterpart of the Anglo-Saxon Witan, as an integral part of the constitu-

[42] "Vita Margaretæ," Chap. ii. 14.
[43] "Vita Col.," ii. 36.
[44] "Hist. Eccl.," v. 21.
[45] "Chrons. of Picts and Scots," 8.
[46] *Ibid.*, 9.
[47] "Vita Margaretæ," ii. 6, f.1

tion of the Celtic kingdom. All we have to go on are indications that the king was to a certain extent dependent in the discharge of his office on the co-operation of the magnates of his kingdom, lay and cleric. We certainly find a council with both legislative and judicial powers in existence at the beginning of the twelfth century (reign of Alexander I.). Such an institution would hardly spring up in a single reign, and we may justifiably conclude, with the indications referred to before us, that it went back into the times of Alexander's predecessors.

It is further probable that there were royal courts and royal officials for the ordinary maintenance of justice. In his "Life of Queen Margaret" Turgot speaks of "the distractions of law suits" among the cares of government in the reign of Malcolm III.[48] The archaic system of reparation for offences by compensation must have involved the existence of district courts for this purpose. There certainly was a justiciar in the beginning of the twelfth century, and we hear of *Judices Regis* with jurisdiction over definite districts such as Lennox, Angus, Galloway.[49] In the Inquisition into the see of Glasgow, sworn evidence was given by the judges of Cumbria [50] (Strathclyde). In a charter of Macbeth and his queen mention is made of the office of *vice-comes* or sheriff, and if this were authentic the office must have been in operation as early as the middle of the eleventh century. There is, however, some difficulty in accepting this section of the charter as part of the original, and Sir Archibald Lawrie, its most recent editor, thinks that it belongs to the reign of David I. Another officer, the *Maer*, seems to have been equivalent to the *Tóisech*, for in the laws of William the Lion he is called *Tosorderch* [51] or coroner, and in these laws his office is to summon those accused of crime to appear for trial.

[48] Inter causarum tumultus, "Vita Mar.," ii. 12.

[49] Innes, "Acts of Parliament," i., Preface, 10.

[50] "Early Scottish Charters," 50; Innes, "Registrum Episcopatus Glasguensis," i. 8.

[51] "Acts of Parliament," i. 380. *Maer* was, however, a common term for denoting any delegated office. It might, for instance, denote a head forester.

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PART II

THE EARLY FEUDAL PERIOD

CHAPTER I

THE RISE OF FEUDALISM

FEUDALISM is the distinctive term applied to the social system more or less prevailing in Europe throughout the Middle Ages. It is supposed to have been introduced into England by the Norman Conquest in the second half of the eleventh century, and somewhat later into Scotland under Anglo-Norman influence. As a matter of fact, we have found reasons for concluding that the feudal tendency was operative both north and south of the Tweed long before this period. It was developing among both the Anglo-Saxon and Celtic inhabitants of the British Isles. Feudalism is only the culmination of this tendency. The study of Anglo-Saxon and Celtic social and economic history by competent investigators in recent times has clearly shown the gradual trend towards feudalism in operation several centuries before the Norman Conquest. In pre-Norman England the growing practice of commendation or patronage in return for protection had reduced a large proportion of the freemen to a state of dependence on a lord. A large portion of the folkland—the free *allod*—had passed into the hands of lords, and was held of them by their dependent tenants on certain conditions, with the additional right of private jurisdiction (*sac* and *soc*, cause and suit), of holding manorial courts for the trial of a variety of causes in addition to the courts of the shire and the hundred. Moreover, the rise of a military class, in addition to the national army, for the defence of the State in case of emergency, with grants

of land from the king as the reward of military service, and on condition of further services, was transforming the *thegn* into the military vassal in the feudal sense. This incipient feudalism is more apparent in pre-Norman England than in Celtic Scotland. But even in the scanty records at our disposal there are indications, in the matter of dependent land tenure and rights of jurisdiction, of a similar development in North as well as South Britain.

The feudal system, as established by the Norman conqueror and gradually introduced into Scotland, was based on land tenure. The king is assumed to be the universal landowner, from whom every other landowner holds immediately or mediately. In the case of the Norman conqueror, the theory may be said to have corresponded to the fact. William I. really held the country in virtue of conquest, though he might adduce other pretexts in support of his claim to the crown. As conqueror, he acted on this principle in distributing a large portion of the land to his Norman followers, and in recognising the possessions of those of the native proprietors whom he did not displace in favour of these followers. In the case of Scotland the theory was only a legal fiction to explain the fact of the feudal tenure which developed in Scotland during the twelfth and thirteenth centuries, with the exception of the Highlands, where the more primitive system of land tenure long survived. There never had been a time when the Scottish king could be said to be what the Norman conqueror claimed to be in eleventh-century England—the universal landowner. Fordun, indeed, writing in the second half of the fourteenth century, tells us that the Scottish kings anciently owned the whole land as their personal property (*propria possessio*). He professes to have derived his information from historical records (*historiæ tradunt*), and the belief undoubtedly existed before his time. According to this belief the whole land belonged to the king, not in virtue of conquest, as in the case of the Norman Conquest, but of ancient custom (*ritu priscorum*). He proceeds to tell us how Malcolm II., in the early part of the eleventh century, distributed the whole land, which was then divided into thanages, in various proportions and according to

status, to tenants holding at will, or for a period of years, or for life, or in perpetuity. The lowest class, the simple tillers of the soil (*agricolæ*), were either tenants at will or those holding by yearly lease (*ad firmam*), corresponding evidently to the *Bondi* and *Nativi* of the charters. The next class were freemen (*Liberi et generosi*), holding for a term of years or for life, with remainder to one or two heirs (the *Libere tenentes* of the charters). The higher class, consisting of knights, thanes, and chiefs (*principes*), held in perpetuity, not by lease but in feu farm (*in feodifirmam*), on condition of paying an annual feu-duty to the king. The king, we are further informed, retained for himself only the Moot-Hill of Scone, stipulating that they should provide him with the means of maintaining the royal dignity in the form of lands, or rents, or a yearly subsidy (*censum*); which sustenance, we are further told, was cheerfully approved by the commons and nobles (*tam plebe quam nobilibus*). Moreover, the nobles granted to the king the right of the wardship of minors, and relief of marriage dues.[1]

This is an accurate reflection of feudal land tenure as it existed in Fordun's day. But the story is entirely baseless as an explanation of the origin of the system. It is a pure assumption as far as any such transaction on the part of Malcolm or any other Scottish king is concerned. Attempts have been made to substitute Malcolm III. for Malcolm II.[2] But such a transaction is as impossible in the reign of the third Malcolm as of the second Malcolm, and is merely the device of some credulous scribe or inventive lawyer to give a historic explanation of the rise of what had become the prevailing system of feudal tenure in Scotland. The story is simply a fiction to account for the gradual development which had produced the state of things existing in Fordun's time, when the fiction had become a present historic fact.

The feudalising process in the Norman sense appears to have begun in the early twelfth century with the growing

[1] Fordun, Lib. iv. 43. The story also appears in briefer form in the Preface to the Spurious Acts of Malcolm II., "Acts of Parliament," i. 709 f.

[2] See, for instance, Walter Ross, "Lectures on the Law of Scotland," ii. 56 f.

influence of the Norman and English settlers in the reigns of the sons of Malcolm III. and Margaret, particularly of David I. The southern influence, already considerable in Malcolm's reign, was strengthened by the close relations which, in spite of frequent friction and feud, the Scottish kings of the next century and a half maintained with the Court of England. They allied themselves in marriage with Anglo-Norman princesses. Alexander I. became the husband of a natural daughter of Henry I.; his brother David, who had been educated at the English Court, of the widow of Simon de Liz, Earl of Northampton. William the Lion was united to Ermengarde, a relative of Henry II.; Alexander II. to the daughter of King John; Alexander III. to the daughter of Henry III. Moreover, the earlier of these kings were lords under the English Crown of a large part of the north of England. From the Norman Conquest onwards many a refugee, both English and Norman, sought the protection of the Scottish kings, who were only too glad to avail themselves of the service of trained Norman warriors against their own unruly Celtic subjects of Galloway and Moray, who frequently rose in revolt against their authority. Hence the steady tide of Norman, or Anglo-Norman, penetration which ere long reached the shores of the Moray Firth. The tide was already strong in the reign of David I., whose conquest of Moray, with the aid of these southern barons, enabled him to extend this alien settlement from the southern Lowlands to this northern region. Evidence of the increasing tide is furnished by the charters of David I. and his successors. Whilst those of Edgar and Alexander I. that have survived are attested by Celtic or English witnesses (in cases in which the names of witnesses are given), the witnesses to David's charters are predominantly Norman, though there is a fair proportion of English names. The Celtic proportion is comparatively small. The Norman element is so striking that we are warranted in concluding that the Norman influence had become the dominant one on policy and institutions. Those Norman names recur in stereotyped fashion in charter after charter, and include those families which were to take a leading part in early Scottish mediæval history—the De Bruces, Umfravilles,

Baliols, Morevilles, Cumins, Somervilles, Lindsays, Hays, Avenels, Burnevilles, Fitzalans (Stewarts), Olifards (Oliphants), Sulis, Engaines, Grahams, Vescis, Riddels, Colvilles. The same feature is characteristic of documents of later reigns.[3] The hostages delivered by William the Lion to Henry II. in accordance with the Treaty of Falaise in 1174, for instance, are nearly all of Norman descent.[4] It is in this reign that the redoubtable name of Douglas first appears in charters as lord of the manor of this name on the Douglas Water.[5] Another name, famous in the War of Independence, that of the Moray family, is already historic in the thirteenth century with Friskin de Moravia, who witnesses a charter of Alexander III. The De Bissets, De Boscos, De Roses, and others of Norman or Anglo-Norman descent are also found all over this northern land from the time of William the Lion onwards, as Mr Cosmo Innes has shown from the contents of the charter chest of the Roses of Kilravock. "Not a Celt, not a man called by a patronymic is an actor, or named in these deeds, except the great Earls of Ross, showing themselves occasionally out of their Highland fastnesses."[6]

From the reign of David I. onwards, Norman or Anglo-Norman magnates have become the chief landowners from the Tweed to the Moray Firth. These adventurers and their followers were lavishly rewarded with grants of land, more or less extensive. Curiously enough, only a few actual grants are among the numerous charters of David—that of Annandale to Robert de Brus in 1124, for instance, to Walter de Riddel of Liliesleaf and other Border estates. We know from other sources that Randulf de Sules obtained a grant of Liddlesdale; Hugo de Moreville of lands in Lauderdale, the Lothians, and Cunningham; De Somerville the manor of Carnwath; Engaine that of Crailing; Avenel in Eskdale. The only fact in David's documents evincing their presence in the land is the attestation by them of his

[3] See Lawrie, "Early Scottish Charters"; Anderson, "Selectus Diplomatum Scotiæ Thesaurus"; "The Laing Charters."

[4] Lawrie, "Annals of the Reigns of Malcolm and William," 194.

[5] Innes, "Origines Parochiales," i. 155.

[6] "Sketches of Early Scotch History," 438-439.

numerous grants to churches, etc. But it is evident from the grants recorded as also made by them to churches or individuals, that they had been lavishly endowed with estates all over the southern and eastern Lowlands. A large portion of the soil must have changed hands during this period, although there seems to have been no set attempt generally to displace the native proprietors, except in Galloway and Moray, like that of the Norman William in England. On the other hand, it is evident that this foreign penetration aroused no little antagonism to the presence of these adventurers and the feudal policy which they represented. This antagonism was intensified by the old dynastic feud between the king and the Celtic opposition in Galloway and Moray; and the frequent risings in these regions, which in the case of Moray were only finally suppressed in the reign of Alexander II., were partly actuated by hatred of this Anglo-Norman intrusion. When, for instance, William the Lion was taken prisoner at Alnwick in 1174, the wild men of Galloway rose and, in the words of the chronicler, "killed without mercy all the English and Normans (*Anglicos et Francigenas*) whom they found in their lands, and destroyed the castles and fortifications which the king of the Scots had established therein, and slew all their inmates." Moreover, the onslaught was not confined to the inhabitants of Galloway. The Scots, we are further told, returning from the English expedition, turned on the English inhabiting the Scottish towns and burghs, towards whom they had hitherto masked their hatred for fear of the king, "and as many of them as they could lay their hands on they killed, the remainder who could escape fleeing for refuge to the royal castles." [7] These intruders might represent an advance in civilisation and a new social order. But they were steeped in the violent and self-seeking spirit of the age in diffusing this civilisation, and the natives could hardly be expected to relish a policy which was tending to oust them from the land and its government, and enrich this new element at their expense.

Despite native opposition, the feudal system represented by this intrusion took firm root in the land, except within the

[7] Lawrie, "Annals," 189-190; Anderson, "Scottish Annals," 256.

Highlands, during the twelfth and thirteenth centuries. Like England, Scotland was transformed into a feudal state, though the process was more gradual, less violent than in the England of William the Conqueror.

The distinctive feature of feudal tenure is that land is granted by a superior and held "in fee and heritage" by a dependent vassal, or tenant, as the term may be, of this superior.[8] The principle of the system is that there can be no land without a lord (*nulle terre sans seigneur*). Under this system every one is a dependant on some one above him, and the regulation of this dependence is what constitutes feudal law. The tenure is, however, a complicated one in virtue of the principle of subinfeudation. Theoretically, the king being the universal landowner, every one must in the last resort hold of him. But this tenure may be direct or indirect, immediate or mediate. Those to whom the king makes a grant directly out of the royal demesne or other lands at the disposal of the crown hold immediately of him, and are known as his tenants in chief (*in capite*). But these tenants in chief may and do make grants by subinfeudation of a portion or portions of their lands, and the grantees become their subtenants, holding their lands by the same form of tenure as these hold of the king. These subtenants may further make over a portion of their land to others, and thus the feudal tenure becomes a complex one according as the tenant holds of the king, or the king's tenant, or, it may be, of the tenant of the king's tenant. There may be a series of lords and tenants according to the relation in which the holder stands to the one above or below him.[9] In the charters we accordingly find the king granting land to an individual, lay or ecclesiastical, and this individual in turn making grants out of it to others, these in turn possibly granting a part to a fourth party. In any case, from the king downwards, it is held by a dependant of a superior on certain conditions involving definite rights and obligations

[8] In feudo et hereditate, Lawrie, "Early Scottish Charters," 80, etc. The term tenant is the usual one in the earlier Scottish feudal period. Later the term vassal was used.

[9] For examples of this complicated system see Innes, "Early Scotch History," 93.

of a distinctively feudal character on the part of both the grantor and the grantee.

In the statutes of William the Lion those thus holding are spoken of as bishops, abbots, earls, barons, knights, and, generally, free-holders (*libere tenentes*). These might all be tenants in chief, holding directly of the crown. But the lesser free-holders might be subvassals (*vavasours*) of the greater tenants in chief.[10] In any case, all grants by charter can only be held by freemen, and among freemen status plays an important part. The higher class of earls, barons, knights, and the holders of any portion of a knight's fee, are noble. The ordinary freeman who does not hold by charter of the king or other superior, is not. According to a statute of Alexander II., only a knight, or the son of a knight, or one holding a portion of a knight's fee, or one holding his feu by charter and free service, is noble. On the other side of the line are the freeman who is only a lease-holder (*Firmarius*), the churl-born tenant, the villein or *Rusticus*.[11]

The title of earl during the early period is a restricted one, and the usual title for the large landowner holding of the crown is baron. The Norman and English immigrants who received grants from David I. are already termed barons, and their estates were known as baronies.[12] The title thane also occurs in David's charters among those holding of the crown.[13] But the tendency was ultimately to transform the thanage into a barony or into a knight's holding. In addition to the thane we hear also, in one of David's charters to the monks of St Cuthbert, of "drengs" —the Anglo-Saxon name of vassals in Lothian and Tweeddale, holding of David as Earl of Lothian before he became king. The term seems to have been the forerunner of the later knight.

An essential feature of the feudal grant is the charter

[10] "Acts of Parliament," i. 375, 377, 380, 382.

[11] "Acts," i. 400-401.

[12] See, for instance, "Early Scottish Charters," 79-80, where David in granting Swinton to Arnulf, his soldier (miles), speaks of "my barons"; *cf. ibid.*, 180.

[13] "Early Scottish Charters," 23, 67, 166; *cf.* "Acts," i. 377.

or written title. Many of those of the earlier period are simple statements implying rather than expressing what the grant legally involves. Those of the king are addressed sometimes to his subjects generally (*probi homines*), often to the various classes or orders of the realm. Sometimes the king distinguishes between the component races of the kingdom, between Scots, English, French (Normans), and even Galwegians, for these different elements of the population are still distinguishable, and do not form an organic people, though the king claims the allegiance of all. The king usually describes himself as *Rex Scottorum* or *Rex Scotiæ*, sometimes by the grace of God, sometimes not.

The grant by charter varied in accordance with the character of the holding. The subject granted might be held in knight's fee, or in frankalmoign—free alms—or in soccage, or in burgage.

To take first the case of a grant in knight's fee—so termed because it involves, besides other obligations, the special one of rendering military service. The charter conveys the land in question to the grantee and his heirs " to hold and have in fee and heritage " (*in feodo et hereditate*, or *feodo militari*), *i.e.*, in hereditary dependence on the grantor. It gives what the feudists call the *dominium utile*—the power of hereditary possession and use—while the superior retains what they call the *dominium directum*, involving a certain right and interest in the land.[14] It describes the extent of the land conveyed by its marches, or its amount, or value, or as held by the previous proprietor. It usually particularises its character, mentioning woods, thickets, and plains (arable land), meadows and pastures (restricted and common grazings), moors and marshes, roads and paths, stanks or fishponds, mills, hawkings, fishings, etc., adding generally " all that pertains " to the land in question. It conveys, further, criminal and civil jurisdiction within the land, greater or less according to the rank of the grantee. In the case of a barony, this jurisdiction is expressed by such technical terms as *Furca et Fossa*, *Sac* and *Soc*, *Toll* and *Team*,

[14] See Craig, " Jus Feudale," 56 f.; Ross, " History of the Law of Scotland," ii. 147 f.

Infangthef and *Outfangthef*. *Furca et Fossa* is a general power of life and death over criminals,[15] male and female. *Sac* and *Soc* means cause and suit—the general right to try actions in one's court, for every lord possessed civil jurisdiction. He had a court to which he summoned his tenants or vassals who, being of equal rank, are known as the *Pares Curiæ*, over which he or his steward presided, and in which suits were tried, grants made, and a new tenant invested. *Toll* may be freedom from toll or custom within the barony, or the right to take toll, as the interpretation may be. *Team* seems to have been the right to bring outsiders as pledges or warranters into one's court rather than jurisdiction over the families or *sequela* (brood) of villeins. *Infangthef* is the right to do justice on a thief caught within the barony; *Outfangthef* on one pursued and caught outside its bounds.[16]

Such a grant came to be known as a grant in free barony. It was second, in point of jurisdiction, only to the grant of a regality which was later accorded to the great magnates of the land, required the confirmation of parliament, and carried with it more ample powers. In the case of the subinfeudation of a barony the jurisdiction of the subtenant was more limited than that of the baron of whom he held.

The grant in knight's fee involves certain obligations and burdens, as well as conveys possession and privilege. It involves service (*servitium*), particularly, but not exclusively, military service, or ward as it was termed in Scotland. The barony consists of what was called a knight's fee, or it may be, several knights' fees, *i.e.*, it is granted on condition of providing the service of one knight[17] (mounted man at arms) or several knights, when called by the king to do so. In the case of lesser grants it might be half a knight's fee,[18]

[15] Craig, "Jus Feudale," 105.

[16] For examples of such grants in the early period see Lawrie, "Early Scottish Charters" (David I.); "Laing Charters," 1 f. (Malcolm IV. and William the Lion); "National MSS. of Scotland," i.; Anderson, "Diplomata."

[17] Per servitium unius militis, "Early Scottish Charters," 180.

[18] Per servitium dimidii militis, "Early Scottish Charters," 150. This service was also known as forensic service, that is, inherent in the land

or even a smaller proportion. It was the indispensable *reddendo* of every barony. It did not, however, displace the old obligation of every subject to service in the king's army—the *Feacht* and *Sluagad*, expedition and hosting of the Celtic period. It only supplemented it. Besides providing knight's service, the tenant in chief of the crown was as a rule bound to serve in person in time of war, to lead the men of his barony in the king's army, though in case of sickness or infirmity he might send a substitute, and the benefit of substitution was also accorded to women and ecclesiastics.

Besides military service, the grant involved the burdens of wardship, relief, and aid. The superior of whatever grade, from the king downwards, has the right to the wardship of an heir or an heiress who is a minor, and draws the rents and profits of the land for his own use subject to the maintenance of the minor till he or she comes of age. He has the right to give the minor in marriage—" to sell them in marriage," in the English phrase. Further, he has the right to a relief on the accession of an heir to the land (payment for " relieving " the land out of the superior's hands). He is entitled to levy an aid [19] (*auxilium*) on occasion, such as the knighting of his eldest son and the marrying of his eldest daughter, and the king in particular, besides exercising these rights, may levy an aid for the ransom of his body and for the prosecution of his wars.[20] If the tenant fails to perform the services " due and accustomed," the lord may proceed against him by distress, seizing his chattels until he satisfies his demands. In case of outlawry, or felony, or alienation of the land without the lord's consent, the land escheats, or is forfeited to the lord, and in case of treason, to the king.[21]

independently of any arrangement as to military service made by the holder of a barony with a subtenant (intrinsic service); Pollock and Maitland, " History of English Law," i. 216.

[19] For the exercise of this right see the charter of Malcolm IV. to Scone, in which he prohibits the Earl of Angus and the Sheriffs of Forfar and Scone from collecting aids in the abbot's lands, " Liber de Scon," 13.

[20] Fordun, " Annals," Chaps. 3 and 21.

[21] Assisæ Regis Wil., " Acts," i. 380, *cf.* 652-653.

The grant carries with it homage as well as service to the donor (*pro servitio et homagio*). Before he is invested the grantee must do homage and swear fealty to the superior. Ungirt and with bare head, he kneels, and, placing his hands between those of the lord, declares that he becomes his man, and that he will bear faith to him against all folk. If the lord is the king, he does liege, *i.e.*, unrestricted homage. If a subject, the homage is conditioned by the faith which he owes to the king. Rising, he swears fealty or fidelity with his hand on the Gospels, repeating the obligation to bear faith. A woman is exempted from homage, and only swears fealty to her lord. If he subsequently acquires a grant from another lord, he also renders only conditional homage, *i.e.*, saving the faith that he bears to his first lord, without whose consent he cannot enter into this relation to another. The obligation of fealty is, however, mutual, for on his part the lord obliges himself to protect, "warrant," and defend the tenant against violence, or in case of an action at law brought against him, and to respect the rights inherent in his tenure. The ceremony of investiture is completed by some symbolic act, such as placing a symbol on the altar of a church, as was done by King Edgar, for instance, in granting Swinton to the monks of Coldingham.[22]

Though the charter grants hereditary possession, the holder appears to have taken the precaution to have it confirmed on occasion, and successive kings are found thus confirming grants made by their predecessors. The charter by which the Earl of Fife held the lands granted by King David, for instance, was confirmed by Alexander II., and this charter of confirmation informs us that it had already been confirmed by William the Lion.[23] Similarly, the tenant in chief confirms the charter of his subtenant, and no tenant is at liberty to sub-feu without the consent of his respective superior.

Most of the lands granted to the Church—to bishoprics and monasteries — are granted in frankalmoign — in free

[22] "Early Scottish Charters," 17. For other examples, see Innes, "Scottish Legal Antiquities," 85 f. Homage is treated of at length in the "Regiam Majestatem," Lib. ii. 52 f., "Acts of Parliament," i. 619.

[23] "Nat. MSS.," i. 28.

alms. It is given for religious service—usually for the worship of God and the salvation of the souls of the donor and his ancestors.[24] It was a feudal grant, as in the case of secular grants; the fact is sometimes particularised, as in the phrase *in feodo et in elemosinam*.[25] But the feudal character of the grant is usually assumed, and it is given as an eleemosynary benefaction, generally in perpetuity. Usually the adjective "pure" or "free" alms is added,[26] and frequently the two are combined and the grant is made in "pure, free, and perpetual alms."[27] The land thus granted was highly privileged by reason of its exemption from most of the burdens inhering in secular grants. The exemption is sometimes expressed in very sweeping terms in the charters of David, whose generosity to the Church knew no bounds. For instance, in the charter to Melrose, David grants certain lands "free from all earthly service and secular exaction" (*liberas ab omni terreno servitio et exactione seculari*).[28] In particular the grant carried with it exemption from ordinary military service or "hosting" on the part of the tenants of the ecclesiastical superior—the bishop or abbot concerned. It does not seem, however, to have exempted them from service in the emergency of an invasion, and lands granted ordinarily to churchmen, and not in frank-almoign, were liable to military service (*communis exercitus*).[29] Even in David's charters "the defence of the kingdom" is sometimes reserved (*salva defensione regni*), and in case of the miscarriage or neglect of justice in the ecclesiastical court, the right of the royal justice (*salva justicia regali*) is also reserved.[30] Nor does the exemption seem to have covered the duty of assisting in the building of the king's

[24] See, for instance, King Edgar's grant to the monks of St Cuthbert, "Early Scottish Charters," 16-17; Alexander I. to Scone, *ibid.*, 42; David I. to the church of Dunfermline.

[25] "Early Scottish Charters," 87.

[26] See, for instance, "Early Scottish Charters," 89, 109, 116, 135, etc.

[27] See, for instance, charter of Alexander II. to Pluscarden, "Nat. MSS.," i. 26.

[28] "Early Scottish Charters," 107, *cf.* 139.

[29] See grant by David to the Bishop of Caithness, "Early Scottish Charters," 179.

[30] "Early Scottish Charters," 61, 141.

fortresses and the construction of the king's highways and bridges, though David's generosity in one case goes so far as to exempt the tenants of the Abbey of Dunfermline "from all work on the king's castles and bridges, and all other works." [31] Such exemption could only be granted by the crown, and the grant of a superior other than the king (for the king's tenants in chief and others were also pious benefactors) had to be confirmed by him.[32] Or, the grantor took upon himself the responsibility for the military and other services inhering in the land granted. David was notoriously open-handed in conferring these gifts. But such privileges seem to have been more grudgingly given by subsequent kings, and the tendency was to restrict it, and even if the phrase "in free, pure, and perpetual alms" was used in the charter, the reservation of service was sometimes expressed and such service exacted, especially when only the words "in perpetual alms" occurred in the charter.[33]

As in the case of barons, the ordinary grants to ecclesiastics carried the right of jurisdiction over the tenants of the lands conferred. Alexander I., for instance, grants to the prior and monks of Scone the right to hold their own court—"the ordeal by combat, hot iron, and water, and all other privileges pertaining to a court" (*et in omnibus aliis libertatibus ad curiam pertinentibus*).[34] Similarly, David I. grants Coldingham to the monks of St Cuthbert with *Sac* and *Soc*, *Toll* and *Team*, and *Infangthef*.[35] Again, Alexander II. grants to the monks of Pluscarden, along with the lands particularised, "all suits and pleas in all the foresaid possessions happening in their court, which we give to them to be litigated and determined, excepting those that specially belong to our crown." [36]

A third form of feudal tenure was that known as fee

[31] "Early Scottish Charters," 70. [32] *Ibid.*, 195.
[33] Dowden, "Mediæval Church in Scotland," 156 f.
[34] "Early Scottish Charters," 43-44. [35] *Ibid.*, 55.
[36] "Nat. MSS.," i. 26. The grant with *Furca et Fossa*, power of life and death, which occurs in a charter of Alexander II. to the church of Scone, does not seem to have been usually conveyed in ecclesiastical charters, "Liber de Scon," 42.

farm (*in feodifirmam*), or tenure in free soccage, as it was termed in England. It was a grant made heritably to the grantee and his heirs, and the holder was known as *feodifirmarius* (Scottish, *fewfermar*).[37] It did not involve military service, but rent (*reddendo*), in money or kind—so many chalders of oatmeal, wheat, or barley, for instance—and a certain amount of agricultural service. The rent might be merely a formal acknowledgment of the lord's superiority—the annual presentation of some article or articles such as a pair of gilt spurs, a sparrow-hawk, a pair of gloves, a pound of pepper or wax, which were known as *blench* duties.[38] This form of tenure differed from that merely on lease (*ad firmam*) for a term of years, which carried only the usufruct of the land for the time being. The grant was made by charter, and conveyed the possession of the land to the grantee and his heirs, as in the case of any other heritable feudal holding.

Burgage tenure resembles the fee farm in respect of the payment of rent for the tenements held by the inhabitants of the burgh. Out of these grew what was called the farm of the burgh (*firma burgi*), which, as we shall see later, paved the way for the rise of self-government in its feudal form within these burghal communities.

The distinctive feature of these tenures is heritable possession in dependence on a superior, held by charter and involving service or rent, or both, according to the character of the grant—whether in knight's fee, alms, free soccage, or burgage. Outside the rights and privileges which the charter conveys, though bound up with the system itself, is the element of the population which holds only by lease or at the will of the lord. It consists partly of freemen, partly of the unfree or villein class. To the freemen belong those holding by lease (*firma*, Scottish, tack) for life, for a term of years, or from year to year—*firmarii*, farmers, who pay rent in kind or money and service. They are the *Liberi et generosi* of Fordun—the free and kindly tenants of

[37] "Acts of Parliament," i. 721. Free soccage is also mentioned in the "Regiam Majestatem," ii. c. 18.

[38] For an extensive list of these, see Innes, "Scotch Legal Antiquities," 64 f.

old Scottish documents. Many of them held their land by what was known as steelbow tenure, the landlord furnishing the stock and implements, the tenant paying a rent and returning the stock and implements at the same value at the end of the lease.[39] To the unfree class belong the *Nativi*, *Bondi*, *Rustici* of the charters and the statutes (Scottish, *neyf*, carl; English, *villein*). To it also belong the *Cottarii*, having a house and one or several acres of land; the *Husbandi*, holding a fourth of a ploughgate; the *Hurdmanni* and *Gressmanni* who are classed among the *Bondi* in an agreement between the Bishop of St Andrews and the Abbot of Dunfermline.[40] We get some information regarding this class from the "Quoniam Attachiamenta," otherwise called "Laws of the Barons." There were, it seems, various ways of becoming a bondman and of proving his bondage in case the lord's claim were denied. These *Nativi* were adjudged to be so if the lord could show that the great-grandfather, grandfather, and father of the bondman in question had resided on the land and rendered him and his predecessors rent and service. That is to say, residence and servile service to the fourth generation constituted proof of his bondage in case of the bondman challenging it in the lord's court, in the presence of the king's justiciary or the sheriff. Hence the practice of keeping genealogies of these bondmen as one would the pedigree of high-bred horses or cattle. The same thing applies in the case of the descendants in the fourth generation of a bondman who was not a native of the locality, but a stranger who had received servile land from the lord and done servile service for him. The third case is that of the freeman who for protection and maintenance gave himself to a lord in his court to be his bondman "by the hair of his forehead." If he withdraws, the lord may prove his bondage before the justiciary and subject him to his former servitude, taking from him all his goods to the value of 4d.[41] It thus appears that the occupation of servile land for four generations rendered the occupier, whether the descendant of a native of the place or a stranger

[39] Skene, "Celtic Scotland," iii. 243, 283, 370.
[40] "Early Scottish Charters," 146.
[41] "Acts," i. 655.

who had settled on it, his lord's hereditary bondman, and that the surrender by a freeman of his personal liberty to a lord reduced him to a state of servitude. In these cases the law recognised his servitude, and went against him in case of any attempt to withdraw from it. If he flees, the lord's bailiff may apprehend him, if found without the king's lordships, burghs, and wardlands, and bring him back without restraint of anyone, under penalty of forfeiture.[42] In the charters and other documents such fugitives are termed *Cumerlache* and *Cumherbes*, old Gaelic names which remind us that this servitude was of pre-feudal origin.[43]

The distinctive feature of this servitude is that the bondman holds only at the will of the lord, and owes him the servile services and burdens incident to his holding and his status. "On the whole," remark Pollock and Maitland in reference to English villeinage, "villein tenure is the tenure of one who owes to his lord, in respect of his tenement, uncertain labour services, or who (by himself or his predecessors) has owed such services in the past, or who is subject to distinctively servile burdens, such as merchet, arbitrary tallage (taxation), or the duty of serving as reeve."[44] It was much the same in Scotland. The tenant in villeinage might be a free man, but his tenure was not free, though he might be at liberty to leave it and go where he pleased. The villein, on the other hand, had not such freedom. He was bound to the soil (*Adscripti Glebæ*), and could be sold along with it to another lord. He was obliged to render service on so many days on the lord's demesne. This was not, indeed, an absolutely distinctive feature of his tenure, for it might apply in the case of lease-holders. But the proportion of service was larger—so many days a week in ploughing, sowing, reaping, or other labour, which in seed time and harvest might be as many as five per week. Whilst the

[42] "Acts," i. 658.

[43] See the mandate of King David in reference to the fugitive serfs of the church of Dunfermline, "Early Scottish Charters," 57; that of William the Lion in reference to those of the Abbey of Scone, "Liber de Scon," 24-25; "Nat. MSS.," 19; Skene, "Celtic Scotland," iii. 222-223.

[44] "History of English Law," i. 358.

amount and character of the work might be regulated, there was an element of uncertainty in it. He might not know in the evening what kind of work he might be called on to do in the morning, for this depended on the lord's command. He was also bound to provide carriage for the lord, to cart goods from a seaport to the barony or the abbey (Kelso or Melrose, for instance), or peats from the lord's moor. He was liable in a merchet or maiden fee to his lord on the marriage of his daughter.[45] At his death his widow paid a heriot. He could not sell a horse or an ox reared out of his own stock without his lord's leave. He could only grind his corn at the lord's mill—a thirlage to which all tenements not held by charter were in fact liable. He owed him multure—a proportion of the grain ground at the mill.

His dependence on the lord was indeed tempered by custom. If he holds at the lord's will, he also holds in accordance with the custom of the barony or manor, as administered in the lord's court. He may appear and sue in this court against another tenant. But he cannot sue against his lord, nor is he protected against him in the king's court. He is protected only by custom as administered in the lord's court. Even so, custom may easily be made to bend to the will of the lord, against whom there lies no appeal to the king's court. He is, moreover, subject to stringent legislation. The first statute of Alexander II., for instance, enjoins that all bondmen (*Rustici*) "dwelling in stedis and tounis in the year bygane" shall begin with all zeal to plough and sow fifteen days before the Feast of the Purification (2nd February). Those with more than four cows shall labour the land assigned to them by the lord with those cows; those with less than five shall labour the land with their hands by digging. If any earl or anyone holding of the king, on whose lands they dwell, will not allow them so to labour the land, he shall forfeit eight cows to the king. Similarly, anyone holding of an earl, so refusing, shall forfeit eight cows to the earl. On the other hand, if the bondman refuses to plough and sow, his lord shall

[45] To this burden the free-holder was also subject.

take from him a cow and a sheep, and force him to do it.[46]

The bondman may become a freeman by his lord's declaration. Or some one may buy him and emancipate him. He may, further, obtain his freedom if his status be not challenged for seven years, or if he reside in a burgh for a day and a year, or become a monk. Though it is unlawful to ordain a villein, once ordained he is free.[47]

Ultimately in virtue of these expedients or the growing practice of commuting service into a rent in money or kind, or both, the villein class, like the English copy-holders, was gradually merged in that of free lease-holders, though the process of emancipation was probably not complete before the fifteenth century, and a number of economic restrictions, such as multure and manrent (the obligation of service by voluntary contract) remained. It is usual to attribute most of the merit of this process of emancipation to the Church—to the ecclesiastical lords of the abbey lands in Scotland. The assumption is a very questionable one. The monastic tenants might on the whole be fairly treated, and the Church might proclaim the doctrine of humanity in the interest of the unfree. But these lords were very tenacious of their corporate rights, and in this respect were less humane than their secular fellows. "There is plenty of evidence," remark Pollock and Maitland, "that of all landlords the religious houses were the most severe—not the most oppressive, but the most tenacious of their rights; they were bent on the maintenance of pure villein tenure and personal villeinage. The immortal but soulless corporation, with her wealth of accurate records, would yield no inch, would enfranchise no serf, would enfranchise no tenement. In practice the secular lord was more humane, because he was more human, because he was careless, because he wanted ready money, because he would die." [48]

Lower in the scale were the *Servi*, who were the personal property of the lord, his menials and labourers who, unlike

[46] "Acts of Parliament," i. 397-398.
[47] "Regiam Majestatem," lib. ii. 9-11.
[48] "History of English Law," i. 361.

the villeins attached to the soil, could be granted or sold as chattels along with what is invidiously called in the charters their "brood" or "litter" (*sequela*).[49] King David, for instance, grants "for ever" to the church of Dunfermline three of these *Servi*, whose names he mentions and whom he describes as "my own men" (*homines meos proprios*), his personal property.[50] Richard de Moreville sells to Henry St Clair two of them "with their sons and daughters and their whole progeny," for three merks.[51] Earl Waldeve gives to Kelso Abbey "Halden and his brother William and all their children and all their litter."[52] Bertram of Reston sells to the Prior of Coldingham, Turkill Hog and his sons and daughters for three merks.[53] William, son of Earl Patrick, gives to the church of St Andrews the serf Merlin with his sons and daughters with their whole future offspring.[54]

By the end of the thirteenth century the old Celtic customs and institutions had been feudalised in Lowland Scotland from the Forth to the Moray Firth.[55] The system had even penetrated into those parts of the Highlands bordering this Lowland region. The Mormaers had become earls holding their lands by charter in knight's fee. The thanages had been transformed mainly into baronies.[56] A large portion of the soil was held in like manner by lords or barons of Norman and English extraction, and the lower class had been dovetailed into the system. It was only in the Highlands that the older tribal system survived. Within the Highland line the clan system was unaffected by the feudalising process operating in the Lowland region where, as we can see from the "Book of Deer," it had subsisted as a subdivision of the tribe or *tuath*. The system continued

[49] Scottish *neyf* in gross in contrast to *neyf regardant*, *i.e.*, attached to the soil.

[50] "Early Scottish Charters," 56.

[51] "Acts of Parliament," i. 94.

[52] "Liber de Calchou," 198.

[53] "Nat. MSS.," i. 29.

[54] "Register of St Andrews," 278.

[55] Skene, "Celtic Scotland," iii. 287 f.

[56] For references of thirteenth-century date to their infeudation, see Skene's Appendix to vol. ii. of Fordun's "Chronicle," 456.

for centuries in the Highlands after the rise of feudalism elsewhere. The clan consisted of those connected by blood through a common ancestor and those who, though of different origin, became its dependants and lived on the clan territory. The nearer relatives of the chief were known as tacksmen or tenants of a superior grade, to whom portions of the clan land were "tacked" and held at the will of the chief, and some of whom might found subordinate septs within the clan. Below these were the ordinary tenants—farmers and cottars who were of more remote descent, bore the same name, and constituted the commonalty of the clan. The dependent element, which consisted of those incorporated into it, such as broken men of other clans, and of different name, came under the obligation of what was termed a bond of manrent for the land assigned them, involving service to the chief and the payment at their decease of what was termed a *calp*, the Lowland heriot. The origin of the system was tribal, patriarchal rather than feudal. It was based on pedigree, kinship rather than on charter, though there was an element of incipient feudalism in it which later came into operation when the charter was introduced into the Highlands, and displaced the old indefinite and customary tenure, to the detriment of the unwritten rights of the people.[57]

The feudal system, thus outlined, was the culmination of an age-long process by which the individual ownership of land was transformed into dependent tenure; the *allod* became the *feodum*, the fee or feu. It has been lauded as a stage in the advancing civilisation of Western Europe. It has been criticised as a retrogression, from the standpoint of individual right. To those of a conservative or romantic turn of mind it is the palladium of social felicity, the ideal of social order. To those whose sympathy and outlook are democratic it is obnoxious as the system of class privilege and usurped rights. Carlyle, for instance, eulogised it; Voltaire anathematised it; while the romantics of our day are carried away by a rather indiscriminating sentimentalism which does not sufficiently reckon with the realism of the

[57] See Skene, iii. 302 f.

system. Its origins are not very attractive. It was born in those rough centuries succeeding the collapse of the Western Roman Empire, when the strong asserted their supremacy over the weak by the right of force and dispossessed or enslaved or drove them out, as in a large part of Roman Britain. It grew up in those centuries when the mass of the freemen was gradually reduced to a state of dependence or servitude, to the advantage of those who succeeded in increasing their possessions. It throve on the necessity of seeking the protection of those able to afford it when custom or law proved incapable to do so. Finally came the conquest of the Norman adventurer in England and the Norman penetration of Scotland, and with this penetration the system of feudal law, regularising and stabilising the conditions which prepared the way for this culmination. This stabilisation was undoubtedly an advance as far as the establishment of a definite social order was concerned. Possession by charter with definite rights and obligations was an improvement on customary tenure, which was apt to give rise to dispute and bloodshed. This advance is specially apparent in as far as it tended to increase the power of the State, to give scope to the effective incidence on the social order of the central authority, acting through a definite system of law. Based on the recognition of mutual rights and obligations as between superior and dependent, it provided the supreme authority and the legal machinery for enforcing these. It substituted the régime of law for the régime of force in the maintenance of the social system which the centuries had evolved. On the other hand, it is questionable whether the system itself, originating as it did largely as the result of violence for the benefit of the few to the detriment of the many, and finally legalising this result in cast-iron fashion, was in all respects an ideal one. Viewed in relation to the time, it may be said to have been an advance. It gave security of tenure. It placed property in land on a legal basis under the protection of the State. It linked those holding this property under it together in a network of superiority and vassalage, and thus tended to nurture the cohesion of the body politic and social. Even in the case of the peasantry it accorded a certain recognition of their

subordinate position within the system. As Vinogradoff has pointed out, it prevented villeinage from lapsing into slavery pure and simple, though the Norman lawyers were actuated by no friendly spirit towards the villein class.[58] But it is not so certain that its mode of tenure, with the cumbrous and complicated law which regulated it, was in itself an advance on the allodial tenure, the absolute ownership of an earlier time. Under this latter system even the ordinary freeman might be the owner of his holding. It was his without respect to any rights and privileges claimed or exercised over him by another freeman, who might own more than he. It descended to his heir without regard to the will of his more affluent neighbour. Under the feudal system this untrammelled right of possession disappeared, and the freeman, who thus became dependent on his more affluent neighbour, was in consequence exposed to disabilities from which he was previously immune. It substituted for the free proprietor the lord of the manor, with its dependent population and the lord's jurisdiction over it, for the autonomous community of more ancient times. It involved certain obligations in the form of dues or service, or both. All land is held in dependence on a lord, who gets into his hands a large part of the waste or common land, and this tenure carries with it certain burdens and obligations. The system is cast by the lawyers into legal form, and the legal theory ignores all rights derived from original free tenure, and regards these rights as derived from the lord as feudal owner of the land. In the case of the free-holder, these rights are, indeed, guaranteed. The unfree have, generally speaking, no such rights, but depend on the sufferance of their lord, though custom may to some extent stand in the place of such. The freeman may sue his lord in the case of any contested claim or right. The unfree cannot, and thus there is for the lower class no doctrine of equality before the law.

Moreover, the system was essentially an aristocratic and militarist one. It drew a far-reaching distinction between those holding by charter and those who did not It con-

[58] "Villainage in England," 132, 135.

ferred the full rights of citizenship on those so holding. It withheld them from those not so holding, and thus whilst favouring the cohesion of the upper classes, it made a deep rift between them and the lower. It was steeped in the class spirit which pedigree and landed possession tend to nurture. It accentuated and perpetuated the disability of the servile class, and only by later reform from economic—and to a less extent humanitarian—motives did this class succeed in obtaining its emancipation. With the Norman military adventurer came the militarist spirit—the belief in force and the glorification of war which, unfortunately, are not peculiar to the feudal age, but which were so marked a feature of the feudal system. It was not a case of cultivating arms for the defence of the realm. It was a case of fighting as the profession of a gentleman, and the glorification of bloodshed as a thing of the highest renown. The feudal age is pre-eminently the golden age of the swashbuckler. Though the profession of arms was also more honourably practised in defence of the weak, and developed a sense of chivalry towards opponents and women, the fighting maniac was all too characteristic of the age, and the horrible methods of pillage and rapine, which the military canons of the age sanctioned, overshadow the more attractive aspect of the knightly spirit. And this militarist spirit in the hands of powerful magnates, who could command the service of a formidable retinue, was destined to become a serious menace to the State, especially in the Scotland of the fifteenth and sixteenth centuries, to threaten at times its disintegration, and expose it periodically to civil war and devastation. Even granting the historic necessity of the system, it is patent that men in the mass hardly suffered it gladly, and that the work of reform in the future was to be directed towards mitigating it and abolishing it. In Scotland there does not seem to have been any set attempt to overthrow it by revolution, unless we regard the Reformation as partly a violent reaction against it on the part of the people at least. It was different in England, France, and Germany, where there were periodic risings on the part of the lower class on behalf of their emancipation from its burdens and disabilities. In England these risings broke out spasmodically from the

fourteenth to the sixteenth centuries, and thereafter the antagonism kept within the path of peaceful reform for the most part. But in France and Germany, where the system subsisted in all its vigour from the Middle Ages into modern times, in spite of repeated attempts to overthrow it, the only remedy was ultimately found in revolution, and the fact of this desperate remedy is the measure of its unsuitability as a final social order, whatever its merits as a stage in political and social evolution in the Middle Ages.

CHAPTER II

THE EARLY FEUDAL KINGSHIP AND THE RISE OF PARLIAMENT

WITH the rise of feudalism the kingship assumes a more definite form as the supreme power in the feudalised kingdom. We learn from the charters something more substantial of its powers and functions than was possible from the scanty sources of the earlier Celtic period. Apart from the charters the documents are still all too scanty, for the public records prior to the War of Independence, with some meagre exceptions, have unfortunately not been preserved, and the chroniclers had too little interest in constitutional history to tell us much. Even so, there is available a fair amount of documentary evidence relative to the period before the reign of Robert I., which has been collected in the first volume of the "Acts of Parliament." Though some of it is of dubious value and cannot claim the authority of official record, it contains authentic matter which may be used to supplement to some extent the evidence of the charters.

The principle of hereditary succession to the throne appears as the established one throughout the period, though there were repeated attempts on the part of the house of Moray to contest the right of the direct descendants of Malcolm Canmore. From Edgar onwards the throne passed in virtue of this principle to the nearest male relative of the deceased king. So firmly established was it that it maintained itself even when the heir was a minor, and when expediency might have suggested the advisability of departing from it. Malcolm IV. succeeded his grandfather, David, at the age of twelve, and Alexander III. was only eight when he succeeded his father in 1249. At the same time the old right of election seems to have found at least

formal expression in the assent of the people to the accession of a successor. Fordun merely mentions the fact of the succession of Edgar, Alexander I., and David I., and says nothing about the mode of it. But in the case of that of Malcolm IV., John of Hexham informs us that "the whole people of the land taking (or acknowledging) Malcolm, in accordance with the custom of that nation, constituted him king." [1] These words, which Fordun reproduces,[2] certainly imply not only that the popular assent was necessary to the validity of the new reign, but that this was part of the customary law observed on these occasions. The same inference may be drawn from the fact, recorded by Fordun,[3] that David, on the death of his son Henry, sent his grandson on a tour throughout the country under the charge of the Earl of Fife to be proclaimed as his heir. From the Chronicle of Melrose we learn that William the Lion, Alexander II., and Alexander III. were similarly raised to the kingship in accordance with "the prevailing custom" [4] by the magnates of the land, lay and cleric, and Fordun expressly tells us that in the cases of Alexander II. and his son, the assent was unanimous. He adds in reference to the accession of the latter that not only the magnates, but the whole clergy and people gave their consent.[5] Though the phrase "the whole clergy and people" may not be taken literally, it shows that the old mode of election still received at least formal recognition at the inauguration of a new reign.

It appears, further, that the ceremony of inauguration or investiture included the consecration and perhaps the coronation of the new king. We have, indeed, no definite and reliable information on this point in the case of the earlier kings of the period, for the statement of Fordun that Malcolm Canmore was placed on the throne at Scone (the Stone of Destiny), and crowned in the presence of the

[1] Tollens igitur omnis populus terræ Malcholmum, sicut consuetudo illius nationis, constituerunt regem pro David avo suo. Lawrie, "Annals of Malcolm and William," 5.

[2] "Gesta Annalia" (Skene), 254. [3] "Chron.," v. 33.

[4] "More Regio, Patrio More," 80, 114, 178; *cf.* Fordun, "Gesta Annalia," 259, 280, 293.

[5] *Ibid.*, 293.

magnates of the kingdom,[6] is of questionable authority for so remote a time. Of the investiture of Edgar and Alexander I. we have no record. Ailred speaks only generally of the usages (*obsequia*, acts of homage) which were observed on the occasion of David's accession, and to which the new king was only with difficulty brought to submit himself by the bishops.[7] There is more explicit evidence for the consecration of William and his successors, Alexander II. and III.[8] In the case of these three kings the ceremony of consecration was performed by the Bishop of St Andrews. Whether the ceremony also included the coronation of the king is not so clear. On the one hand there is the right, undoubtedly ancient, of the earls of Fife to place the crown on the royal head,[9] which seems to show that coronation was part of the ancient ceremony; on the other, the statement of Giraldus Cambrensis, who says that the Scottish kings, like those of Spain, were "never (up to his time, early thirteenth century) accustomed to be crowned or anointed."[10] The ceremony did, at all events, include consecration and the seating of the king in the royal seat of stone at Scone with befitting ritual.[11] It was concluded on the occasion of the accession of the third Alexander, if we may trust Fordun, by the intervention of a Highlander ("Scotus Montanus") who started forth and, kneeling before the Stone of Destiny, recited in the Gaelic language the boy king's lineage back to Scota, daughter of Pharaoh![12]

The supreme power with which the king in the early feudal period was thus invested was not absolute. Not only was the hereditary principle conditioned, formally at least, by the assent of the magnates and even the people, but the king exercised his legislative, judicial, and administrative functions in co-operation with his subjects. It was

[6] "Chron.," v. 9.

[7] Lawrie, "Annals," 7; Anderson, "Scottish Annals from English Chroniclers," 232.

[8] Fordun, "Gesta," 259, 294; "Extracta ex Chronicis," 74; "Chrons. of P. and S.," 176.

[9] Lawrie, "Annals," 7-8.

[10] "Early Sources of Scottish History," ii. 400.

[11] Fordun, "Gesta," 259, 294.

[12] "Gesta," 294-295.

evidently a case of government by council. In both legislation and administration he acts through a series of courts or councils (*curia*, *concilium* or *consilium*).[13] Chief of these was the King's Council. The King's Council was a component part of the feudal system. "Its origin," says Mr Baldwin, "is found in the prevailing theory and practice of the feudal world, according to which the king, like any other lord, was accustomed to receive 'aid and counsel' of his vassals. It was vaguely the right and duty of the lord to demand this, and it was also the right and duty of the vassal to give it."[14] This Council, however, seems gradually to have developed in both Scotland and England into two bodies which bear the same name of *Curia Regis*, or king's court, but differ according to their size and functions. For the consideration of important legislation or other special business of State the Council means the larger body which is assumed to comprise the whole nation—the *communitas* of the kingdom. It passes laws and engages in deliberation over important questions affecting the national interest, such as some complication threatening war with England. This is the King's Council in the sense of the Common Council of the kingdom, which comes to be the designation distinctively applied to it. It is more numerously attended than the ordinary *Curia Regis*, and is supposed to speak with the national voice. It exercises both the legislative and executive function, and meets on special occasions to deliberate with the king and his officers of State. From the King's Council in this larger sense—assumed to embody all free-holders, whether holding immediately or mediately of the king—the King's Council in the more restricted sense of those holding immediately of him—his vassals—seems to have been distinct. For one thing it was not a general assembly of the *tota communitas* of the kingdom, which the other was assumed to be. It was the Council or court of the king's immediate vassals who were bound to attend it if summoned to do so. It was smaller and usually consisted of a comparatively small number of persons

[13] It is not always easy to determine whether *consilium* means a council, or merely consent. See Pollard, "Evolution of Parliament," 28.

[14] "The King's Council During the Middle Ages," 3.

summoned for the transaction of ordinary business affecting the king and the vassals of the crown, such as the granting or confirmation of a charter, or the settlement of some dispute or suit. It met frequently in the locality where the king happened to be—Dunfermline, Edinburgh, Forfar, Lanark, Stirling, Roxburgh, for instance. It consisted, in addition to the royal officials accompanying him, of those magnates, lay and cleric, who might be within easy call or were specially interested in the matter in question. It was presided over by the chancellor, who was the recognised head of the Council in the more restricted sense, and it attended to the daily affairs of Government.

There were, besides, local courts in which justice was dispensed by the royal justiciars and sheriffs, who exercised administrative as well as judicial functions.

It is with the King's Council in the large sense of the Common Council of the kingdom, out of which the later Parliament developed, that we are concerned in this chapter.

There is explicit evidence in the documents of the period of the existence and activity of the Common Council of the kingdom which co-operated with the king in legislation, litigation, and other important affairs. Sometimes, indeed, in the legislation ascribed to the period, the king alone is said to "ordain," "statute," or "decree."[15] Or, the Act in question is said generally to be ordained without mentioning the legislative authority. Legislation in the name of the king only is especially characteristic of the laws ascribed to David. But in that of his successors the co-operation of the Council finds repeated expression, even if some of these laws still bear to be enacted by the king only. Moreover, despite the silence of the laws of David as to the co-operation of the Council, we learn from his charters that this king did convene assemblies for the purpose of approving important matters, such as extensive grants to churches. One of these bears to be approved by "the bishops, earls, and barons of the kingdom with the acquiescence of the clergy and the people."[16] Even in the reign of David's predecessor there

[15] See, for instance, the laws or assisæ ascribed to David I., "Acts," i. 317, 320 f.; to William, 373 f.; to Alexander II., 400.

[16] "Early Scottish Charters," 61.

is explicit evidence that Alexander I. granted charters and transacted important affairs with the co-operation of his magnates.[17] From the time of Malcolm IV. onwards these assemblies become an essential feature of the royal government. He summons an assembly of the prelates and nobles to meet at Perth to deal with a conspiracy which had been hatched during his absence in France.[18] From the chroniclers we hear of a Council summoned by William the Lion in 1173 to discuss the question of his intervention in the Civil War in England between Henry II. and his son Prince Henry.[19] Another Council of bishops, earls, and barons, convened at Brigham, near Berwick, in 1188, refused in very decided terms ("whether or not the king had agreed to it") to grant a tenth for a crusade.[20] Another met at Stirling in 1209 to deliberate on a communication to be sent to King John of England with whom William's relations were very strained.[21] In the laws ascribed to William and his successors enactments are repeatedly made "in the presence of," or "with the advice of," and ultimately "with the consent of" the Council and even "the community (*communitas*, *i.e.*, the free-holders) of the land." In 1184, for instance, William enacts in the presence of the bishops, abbots, priors, earls, barons, and other good men of the land.[22] Another enactment is made by the counsel of the prelates, earls, and barons, and in another the free-holders are conjoined with them.[23] In other instances the Act is made by the Council of the community or by the Common Council of the kingdom.[24] This phraseology occurs in the legislation of Alexander II. and III. It does not necessarily imply that the king was dependent on the consent as well as the advice of the Council. But in some of the enactments of the second and third Alexanders, of John Baliol and Robert I.,

[17] "Early Scottish Charters," 28. Lawrie doubts the genuineness of this charter, *ibid.*, 280. But there is other evidence for the existence of a consultative council in Alexander's time. See Anderson, "Scottish Annals," 146, for the documents.

[18] Fordun, "Gesta," 256.

[19] Lawrie, "Annals," 124.

[20] *Ibid.*, 271-273.

[21] *Ibid.*, 363.

[22] "Acts," i. 376.

[23] *Ibid.*, i. 377, 382.

[24] *Ibid.*, 379-381.

the word "consent" appears (*consensum*, or *consensum et assensum*),[25] and in the thirteenth and early fourteenth centuries consent would seem to be implied where it is not expressly stated.

The evidence for the co-operation of the Council in legislation and government in the twelfth and thirteenth centuries is thus both cumulative and comprehensive. It may be objected that this legislation is lacking in the warrant of official record, and is only known to us in the dubious compilations of later lawyers. These compilations are not, of course, officially authenticated records. The official records of the period disappeared through destruction or neglect. But much of it is evidently of an antique character, and notices of laws, if not the laws themselves, are among the ancient authenticated lists of documents which were in existence in the thirteenth century.[26] The evidence for the existence and activity of the Council of the kingdom may therefore be regarded as reasonably reliable, and it is confirmed by the testimony of the charters which is indubitably authentic. There was undoubtedly a body of ancient customary law which was being defined and amplified in the twelfth and thirteenth centuries under English and Norman influence by the king and his Council. "Scotland," remarks Dr Neilson in his Introduction to the "Acts of the Lords of Council," "was a land of customary law, its customs reflecting more or less faithfully the racial movements which had made its history. The more highly organised system, however, always imposes a deeper mark on the tradition. Hence it could be said that Scottish kings, like William the Lion, professed themselves French in manners, language, and civilisation. Anglican and Norman cords intertwined in thirteenth-century law with the weakening threads of Celticism. Withal, it would be difficult to

[25] "Acts," i. 399, 403 (Alexander II.); 427 (Alexander III.); 453 (Balliol); 460, 464-465 (Robert I.).

[26] *Ibid.*, i. 114-115; "Nat. MSS.," i. 41, where mention is made of "two rolls of the laws and assisæ of the kingdom of Scotland, and of the laws and customs of the burghs of Scotland, and of certain statutes enacted by the kings of Scotland." See also Maitland Thomson, "Public Records of Scotland," 28-29.

maintain that in the fourteenth century Scotland had not a fairly definite body of law. The *Leges et Consuetudines*, to which the Scottish nobles in 1320 proclaimed their determined attachment, were no chimera." [27] In the time of Robert I., Scotland had its "common law" (*communis lex*), and this common law was not the Roman law, as has sometimes been asserted. It is, in fact, explained in the statute in which the phrase occurs as "the auld laws and freedoms which had been rightly used and maintained in former times." [28] It was these ancient laws and customs to which the Scottish barons, assembled in the Abbey of Arbroath, appealed in their declaration to the Pope in 1320. These, together with the rights of the king, who ruled by their consent and assent, and the independence of the kingdom, they would maintain to the death against every attempt to deprive them of their birthright.[29]

There seems to have been a gradual growth of the power of the Council from that of mere consultation to consent. What was at first perhaps based on custom rather than on any definite constitutional principle had been gradually changing throughout the thirteenth century into constitutional practice, which ultimately explicitly limited the exercise of the royal power by the will of the Council in all important affairs of State, such as important negotiations with England, or important legislative and judicial Acts. Co-operation becomes consent. In the case of England in the thirteenth century this development was the result of a constitutional conflict. In the case of Scotland, custom seems to have had a way of growing gradually into legal institution without such constitutional struggle. Unlike England, Scotland in the thirteenth century had no Magna Charta and no Provisions of Oxford. Nevertheless, it ultimately attained something like the constitutional rights and privileges which these famous measures secured for England. Not that there was as yet, before, at earliest, the end of the thirteenth century, any method of bringing the organised consensus of the national will to bear on either legislation or government. Those early feudal Councils

[27] "Acts of Council," 58. [28] "Acts," i. 467. [29] *Ibid.*, 475.

cannot be said to represent the mind and will of the whole body of free-holders, simply because the representative system was not yet in existence. We may not allow ourselves to be misled by such comprehensive terms as "the whole community of the kingdom." These were merely conventional phrases which did not imply that such and such an enactment or other measure actually expressed the deliberate consent of the whole body of subjects. Some of these assemblies were, indeed, of considerable size. But on other occasions the number present was too meagre to express the national will in the literal sense. It is only at the end of the thirteenth century that we hear of at least the tentative operation of the representative principle. Under the year 1296, Wyntoun [30] speaks of the free-holders of Fife electing those who were to attend the Great Council or Parliament, as it was beginning to be called. The parliamentary system which grew out of the early feudal Council was only in the making. Nor had those present at the Council any recognised right to be summoned and give their consent to the measure in deliberation. Every free-holder of the crown was, indeed, bound to attend the court of the king's vassals if summoned to do so. But, as we have noted, the Council of king's vassals seems to have been a different body from the Common Council of the kingdom, and the bishops, earls, and barons who attended the latter were not present either in a representative capacity or in virtue of any constitutional right, but only of the king's summons for the time being. Moreover, the Council or community of the kingdom does not seem to have comprised members of the rising burghs before the end of the thirteenth century at least. The burghs, as we shall see, had their own deliberative court, over which the chamberlain presided. But they did not yet count for much in the national legislation and administration, as transacted in the Common Council of the kingdom, though in virtue of their growing importance and the service rendered by them in the War of Independence, their inclusion in this body was not far off.

The term Parliament, or *Colloquium*, in the sense of a

[30] "Chronicle," Bk. viii., Chap. 11.

deliberative and judicial court, seems to have been applied to the Common Council in the thirteenth century. In this respect the usage in Scotland was the same as in England, where, in the reign of Edward I., the term Parliament is applied to a meeting of the King's Council as well as to a meeting of the Three Estates, to which it was later restricted, Parliament and Council not being as yet organically distinct.[31] It is, however, questionable whether the Parliament or Common Council in Scotland was, as in England, already towards the end of the thirteenth century a meeting of the Three Estates. That, at all events, the term Parliament was by this time applied to the Common Council is certain. Jordan Fantosme even speaks of an assembly held by William the Lion in 1173 as "a plenary Parliament."[32] But it is doubtful whether the term was used to designate the Common Council as early as the twelfth century. Towards the end of the thirteenth it certainly seems to have been so used. Wyntoun, for instance, calls the Council, which met at Scone in 1286 to appoint guardians of the kingdom on the death of Alexander III., a Parliament.[33] It seems also to have been used of the assembly of prelates and barons that convened at Brigham, near Berwick, in 1290, to discuss the marriage of the Maid of Norway with Prince Edward of England.[34] It recurs in the records of two assemblies held in the reign of John Baliol at Scone and Stirling in 1292 and 1293, and of a number in the reign of Robert Bruce.[35] In Bruce's reign, in fact, it tends to become the technical designation of the Common Council of the kingdom. By this time, too, the phraseology of the preambles of the "Acts of Parliament" indicates the distinctive

[31] Leadam and Baldwin, "Select Cases Before the King's Council," Introduction, 20. See also Pollard, "Evolution of Parliament," 47 f.

[32] Lawrie, "Annals," 124. Pollard, reasoning from the French phrase *en plein Parlement*, thinks that plenary means "open" Parliament.

[33] "Chronicle," Bk. viii., Chap. 11.

[34] The term is not applied to the Assembly of Brigham in the documents relative to it in the "Acts of Parliament," i. 441-442. But one of the stipulations of the Treaty was that no *Parliament* should be held beyond the boundaries of Scotland to treat of Scottish affairs. Stevenson, "Documents Illustrative of the History of Scotland," i. 170.

[35] "Acts," i. 446-449, 459, 464, 465, 475.

advance in the recognition of the legislative powers exercised by it. In Bruce's Parliaments the co-operation and consent of those present to the validity of the measures enacted are expressly emphasised. "Wit ye," so runs the preamble to the statutes of King Robert enacted at Scone, "that by the counsel and express consent of the bishops, abbots, priors, earls, barons, and of the whole community of the kingdom in our full Parliament holden at Scone,"[36] etc. King Robert, it is further said, ordained, made, established these laws by the common counsel and express consent of the prelates, earls, barons, and free-holders aforesaid.[37] When this express declaration is lacking, the words, "It is ordained and assented," convey more briefly the same fact.

It is in Robert's reign, too, that representatives of the burghs definitely appear in Parliament as a recognised estate of the realm, and Parliament thereby acquires an additional importance as the instrument of the national will in legislation and government. Burgh representatives seem indeed to have been present in several national assemblies at the end of the thirteenth century. Wyntoun says that the Parliament of 1286 consisted of the estates of Scotland. But in this case the estates appear to mean no more than the conventional community of the kingdom, *i.e.*, the free-holders of the crown. According to Fordun, burgh members took part in the assembly at Berwick which accepted the arbitration of Edward I. in favour of the claim of John Baliol to the kingship in 1292,[38] and Professor Hannay concludes that they were present in that which confirmed the Treaty of 1295 with Philip IV. of France.[39] The inclusion of the *Majores Communitatum* among the prelates, earls, barons, who, in the assembly at Ayr in 1315, recognised the right of succession of Edward Bruce to the crown,[40] seems to refer to the presence of burgh members. The inference is somewhat dubious, but there is no doubt about their presence as a recognised estate of the realm in the Parliament at Cambuskenneth in 1326 and at Edinburgh in the following

[36] "Acts," i. 466.
[37] *Ibid.*
[38] "Gesta," 312-313.
[39] *Scottish Hist. Rev.*, July 1923, 264.
[40] "Acts," i. 465.

year, in which burgesses appear[41] along with earls, barons, and all other free-holders, though the Cambuskenneth assembly can hardly be regarded, owing to the absence of the clergy, as a full Parliament.

Scotland, like England thirty years earlier, had obtained towards the end of Robert I.'s reign its Model Parliament. The long war with England had not only vindicated its independence and asserted its inalienable right to give its allegiance to the king of its choice, despite outside aggressive interference: it had the important constitutional effect of bringing about the full recognition of the right of the whole community, as represented by the burgesses as well as the magnates and other free-holders, to a controlling voice in government and legislation. The *tota communitas*, the whole community of the kingdom, had now acquired a real, instead of a merely fictitious, significance, a definite standing as the result of the constitutional development of the feudal kingdom during the previous two centuries. It was not, indeed, equivalent to the people in the later democratic sense. In the feudal kingdom, with its distinction between free and unfree, its recognition of serfdom and the personal disabilities involved in it, a real democratic constitution was an impossibility. Subject to this limitation, it did imply the recognised possession of certain rights and powers on the part of the estates of the realm.[42]

The consciousness of these rights and powers appear unmistakably in the Acts of the Cambuskenneth Parliament.

[41] "Acts," i. 475, 483.

[42] Professor Pollard thinks that, in the case of England, the importance of the Model Parliament of Edward I. in 1295 did not lie so much in the inclusion of representatives of shires and burghs as in the amalgamation of the tenants in chief and the representatives of shires and burghs with the judicial element of the King's Council. Parliament was originally and remained a court of justice, and it was the amalgamation of the taxing and representative function with the judicial that, he thinks, constituted the new departure in Edward's reign ("Evolution of Parliament," 51). The inclusion of burgh representatives marks, at all events, an important stage in the evolution of the English Parliament as in that of the Scottish, though in both cases the Parliament was not an exclusively deliberative body, but, as we shall see later, continued to act as a court of justice.

Its legislation is of the nature of a compact on certain conditions between king and subject, and if the king breaks it, it becomes null. King Robert complains that owing to the diminution of the leases (*firmæ*) and rents (*redditus*) of the crown by the donations and transferences occasioned by the war, his revenue is greatly diminished. He recognises that the people have been oppressed by intolerable burdens and exactions, but asks that, in view of his efforts and services in vindicating the liberty of the country, the estates might furnish him the means to maintain his royal office and state. The magnates, burgesses, and free-holders present recognise the king's merits, find his request reasonable, and take the facts adduced into benevolent consideration. As the result of their deliberation they agree to concede him for life a tenth penny of all leases and rents. The grant shall, however, be null if the king frustrates its purpose by allowing remissions beforehand in favour of anyone, and it shall cease on the king's death. On the other hand, the king undertakes not to levy any other *collectæ* or taxes, and to limit the legal dues of *prisæ*, carriage, and provisions exigible on his progresses throughout the kingdom. These concessions are, further, not to be taken advantage of by the king's heirs, to the prejudice of the estates, but are valid only during his lifetime.[43] The transaction, which was completed by appending to the document the common seal of the kingdom on the king's part and those of the magnates, burgesses, and other free-holders on their part, is a miniature of constitutional right as it had developed by the end of Bruce's reign. Though it is not a formal declaration of constitutional theory, the document embodies, in the words of Mr Cosmo Innes, "the fundamental principle of a representative constitution. There is a compact between the king and the Three Estates; a claim of right, redress of grievances, a grant of supplies, and a strict limitation of the grant."[44]

[43] "Acts," i. 475-476.

[44] "Scotland in the Middle Ages," 216.

CHAPTER III

ADMINISTRATION AND ORGANISATION

In administration as well as legislation the king in the early feudal period governed with the co-operation of a series of courts and with the assistance of a number of ministers and officials of lesser rank. He himself took an active part in the work of government, moving about from place to place, personally hearing and deciding causes, and attended to the details of administration. Ailred has left a charming picture of King David's practical activity as ruler and judge. "I with my own eyes have seen how once, when ready to go a-hunting, his foot was placed in the stirrup and he wished to mount his horse, yet at the voice of a poor man, requesting that an audience be given him, he drew back his foot, left his horse, and returned to the hall, not to return on that day to his purpose; and kindly and patiently heard the case for which he had been appealed to. Moreover, he was accustomed to sit at the entrance of the royal hall, and diligently to hear the cases of poor men and old women, who on certain days were called to him singly, in whatever district he came to, and often with much labour to satisfy each. For often they disputed with him, and he with them, when he refused to take the person of a poor man, contrary to justice, and they refused to agree with the reason he gave. Moreover, if it chanced that a priest, or a knight, or a monk, or a man rich or poor, or a citizen, or a stranger, or a merchant, or peasant had speech with him, he so talked with each concerning his affairs and duties, appropriately and humbly, that each one thought him careful of his affairs alone; and so he dismissed all, joyous and uplifted." [1]

[1] Anderson, "Scottish Annals," 233-234.

From the time of David onwards the machinery of government becomes fairly distinct. As we have noted, the Common Council of the kingdom concerned itself with litigation as well as legislation. Dr Neilson has suggested parallels between the judicial function of the English and French mediæval Parliaments and the Common Council of Scotland. "That it shared to the full the judicatory purpose common to the Parliaments of France and England is more than a mere assumption from the considerable body of litigation before the king and Council [2] on matters of private right which are on record." He is of opinion that there must have been a considerable number of documents of this kind, to judge from the lost rolls of them mentioned in the Inventory of 1292. As it is, there is a large number of documents ascribed to this period in the first volume of the "Acts of the Parliament of Scotland," which illustrate from the reign of William the Lion onwards the judicial side of the Council's activity. The king in his Council grants or confirms charters, investigates, leads a proof (*recognitum et probatum*), and decides some dispute (*controversia*) about, say, church lands. Or, he confirms and sanctions some agreement between the disputants. "William, King of Scotland," we read, for instance, "confirmed the agreement made at Edinburgh in his full court on St Nicholas Day, 1213, between Maurice, Earl of Menteith, and Maurice the younger, his brother, regarding the plea between them as to the earldom of Menteith claimed by Maurice the younger as his right and heritage, viz., the said Maurice the earl has resigned by staff and baton in the hand of King William the earldom of Menteith, which the king has restored to Maurice the younger as his right, etc.; which agreement the king wills shall be inviolably kept between them, as their chyrograph attests, saving the king's service." [3] Similar decisions are given also in full court at Lanark and other places in the presence of the bishops and his good men (*probi homines*), or in the royal presence with the assistance of the bishops, abbots, earls, and good men

[2] "Acts of the Lords of Council," Introduction, 19.

[3] Bain, "Calendar of Documents Referring to Scotland," i. 447.

of the kingdom.[4] Here is another example in which the process is a lengthy one. The monks of Kelso and Melrose have had a long controversy over the boundaries of their respective lands. They have appealed to the Pope Celestine, and the pope enjoins the king to make diligent inquiry into the question and assign the disputed land to the rightful party. "At length," we read in the king's decision, "I came to Melrose in the year 1202, and, in the presence of many clergy and laymen, the question of the boundaries was discussed. William, Abbot of Melrose, and Osbert, abbot of Kelso, having taken counsel with their respective convents, agreed and made an affidavit that they would stand by my deliverance in the dispute, and that after due inquisition made by me they would firmly and inviolably abide by it. And when I had made—through good and venerable men of the land (*per probos et antiquos homines patriæ*)—diligent inquiry, I caused the parties to be summoned to my presence. At length they came to me at Selkirk in the year 1204, and there in full court (*in plena curia*), clergy and laymen being present, I pronounced sentence that the land in dispute belonged, and ought by right to belong, to the monks of Kelso." [5]

Similarly, a number of such "controversies" are investigated and adjudicated before the Council in the reigns of Alexander II. and III. Here, too, in certain cases the dispute is delegated to "judges" for inquiry and consideration, and Alexander II. "wills and commands" that the agreement arrived at between the parties be observed for the future.[6] Or, the king, with the consent and testimony of the bishops, earls, and barons of the kingdom, clergy and people acquiescing, confirms the grants of his predecessors to the church of Dunfermline.[7] Or, the king and his barons, in a *colloquium* held at Listun in 1235, deliberates on and determines the rights of chase reserved by Roger of Avenel in the grant of lands made by him to the monks of Melrose.[8] Or, Alexander III. orders an inquiry to be made by the

[4] "Acts," i. 386 f. For other cases decided by William, see also Lawrie, "Annals," 116, 236, 251.

[5] *Ibid.*, 389; Lawrie, "Annals," 337-338.

[6] *Ibid.*, 405 f.

[7] *Ibid.*, 406-407.

[8] *Ibid.*, 408.

Justiciar of Scotland regarding a decision of the Sheriff of Perth, and delivers a judgment *in pleno colloquio* at Holyrood with the common consent of his magnates there present.[9] For the reigns of John Baliol and Robert Bruce we have also a series of causes which were adjudicated in the presence of the king in his Parliament, and in these cases there can be no doubt that the Council is the Common Council.[10]

At the same time it is not always clear in the earlier cases whether the decision in question is given by the King's Council in the larger or more restricted sense. As we have noted in the previous chapter, such a distinction existed, and it is evident that in a number of cases the Council or *Curia* which decides is not a general assembly, but a smaller executive body composed of the royal officials and such of the crown vassals as happened to be present for the time being. This *Curia* seems to have been more or less a standing one for the transaction of ordinary judicial and executive business, whereas the Common Council of the kingdom exercised the legislative as well as the judicial function, and also on occasion dealt with the larger question of national policy. While it would probably be near the truth to say that at first, at least, the latter was the smaller Council enlarged for the occasion, it is evident that the tendency was towards their division into two distinct bodies. Certain it is that, towards the end of the period, the larger was developing into the later Parliament, whilst the smaller was becoming the distinctive organ of the ordinary administration. In an important document relative to the king's household, which may be dated about the end of the thirteenth century, the existence and function of the smaller Council, as distinguished from the larger assembly, is manifest. Its preamble tells us that the king (possibly Alexander III., probably John Baliol [11]) desires to discuss in a common assembly of the prelates, earls, and barons of the realm, the general government of the kingdom for the better maintenance of its ancient laws and usages. Here the assembly is manifestly the larger Council or Parliament,

[9] "Acts," i. 426. [10] *Ibid.*, 446-449, 477 f.
[11] Maitland Thomson, "Public Records," 21-22.

as it was beginning to be called. The writer then gives a series of reforms and regulations relative to the duties of the king's ministers in the discharge of their respective offices. These should be appointed by the counsel and consent of the king and all the baronage—the reference being evidently again to the larger Council. On the other hand, in speaking of the administration, mention is made of the Council of which the Chancellor is the head, and here the Council is evidently the smaller body. The distinction between the two expressly appears in the concluding paragraph in which certain matters are to be considered and decided " in full Parliament and not by a less Council." [12]

The document further contains valuable information about the members of the king's household by whom the machinery of government was worked towards the end of the thirteenth century. The term household may be taken to stand for the government as we understand it, for the chief officers of the household were entrusted with duties of a more general character than those connected with the household in the literal sense. It introduces us to the Chancellor, the Chamberlain, the Auditors of the Exchequer, the Clerk of the Rolls, the Steward, the Constable, the Mareschal, the Almoner, the Justiciars, the Sheriffs, and other lower officials. Most of these had been in existence during the greater part of the previous two centuries. Turgot already speaks generally of the king's ministers and in particular of the Chamberlain (*Camerarius*) in the reign of Malcolm Canmore.[13] The Chancellor, Constable, and Butler (*Pincerna*), as well as the Chamberlain, appear in the reign of Alexander I.[14] The Mareschal, the Steward or Seneschal (*Dapifer*), the Justiciars, the Sheriffs, the *Præpositi* (magistrates of burghs), the *Ministri*, are mentioned in the charters of David.[15] The great officers of the crown appear prominently in the documents of David's successors down to Alexander III., the Chancellor usually

[12] The document has been edited by Miss Bateson for the Scottish History Society, vol. ii. of " Miscellanies " (1904).

[13] " Vita Margaretæ," sects. 14 and 28.

[14] " Early Scottish Charters," 28, 30, 42.

[15] *Ibid.*, 57, 60, 76, 86, etc.

taking the leading place. Among the names appended to charters and judicial decisions are also the Clerks of the King. From David onward we hear of the Clerk of the Chapel or the Chancery, the Clerk of the Seal, of the Liverance, of the Prebend (the household daily allowances), and ultimately of the Clerk of the Rolls.[16] The offices of Steward and Constable appear as hereditary in the families of Fitzalan and De Moreville.

The value of the document above mentioned consists in the fact that it gives us a definite idea of these offices as they had developed by the end of the thirteenth century. According to it, the Chancellor, as the head of the King's Council, should be chosen with due regard to his qualifications for so important an office. He should be wise, discreet, impartial to rich and poor, and familiar with the Chancery forms and the laws of the land. He is to reside with the king at the royal pleasure, or in some suitable place at the king's command and for the convenience of the people. He is to have under him as many clerks as are reasonably necessary for the proper discharge of his function. He is apparently the Keeper of the Great Seal, and from his office are issued the charters and other legal documents (writs). He shall only take the recognised fee for attaching the great seal to these documents, "and not more," on pain of the confiscation of his office. He shall issue no writs, except "writs of cause," without the special command of the King's Privy Seal, which "shall be carried and kept by one of the wisest and most discreet of the realm." He is thus subject to control in the discharge of the duties of his responsible post, for, with the exception mentioned, no document could pass the Great Seal without the warrant of the Privy Seal, whose office was, in this respect, of equal responsibility. It is, in fact, described as "the key and safety of the Great Seal and the prevention of all the errors which can arise in the court between the king and the baronage." The Chancellor was usually a churchman, for the simple reason that only churchmen in this early period possessed the legal knowledge and education adequate to

[16] Maitland Thomson, "Public Records," 21.

the discharge of this high office. Many of them became bishops, and in cases where the office was held along with a bishopric, the actual duties of it were delegated to subordinates. Hence the necessity of the control involved in the Privy Seal warrant of the writs issued.

Like that of the Chancellor, the office of the Chamberlain was one of great responsibility, in virtue of the fact that until the reign of James I., when the offices of Chamberlain and Treasurer were separated, he managed the king's revenue and was the head of the Exchequer. His title was, in fact, derived from the treasure chamber (*Camera*), not the bed-chamber of the king; and he was, in addition, the President of the Court of the Four Burghs. Accordingly he must be a man able "to guide and govern the burghs, the demesne lands of the king and his poor husbandmen in the demesne, and to deal with wards and reliefs, marriages, and all manner of issues to the profit of the crown, except those specially assigned by the king to others." That is to say, he is responsible for the revenues from the crown lands or other source in money or kind, and for the ordinary feudal casualties. He was, moreover, entrusted with the wholesale purchase of supplies for the royal maintenance, the arrangement, with the king's consent, of the royal places of residence and the state of the household according to the season of the year, and should so exercise the right of purveyance that the district where the king happened to be residing should not be "ravished" thereby.

The financial administration under his control was a complicated one. We still hear in charters and other documents of the old Celtic dues in kind, of *Can* and *Conveth* in the reigns of Alexander I., David I., Malcolm IV., and William the Lion.[17] With the progress of feudalism, *Reddendo*, *Reditus*, rent becomes the technical designation for the royal dues, and the rent might be derived from fishings, hunting rights, mills, burghs, as well as from lands. The *Reddendo* might be in kind or money. Malcolm IV., for instance, gives to the Abbey of Scone a tenth of his rent of

[17] See "Early Scottish Charters," 43, 62, etc.; Lawrie, "Annals," 151; "Acts of Parliament," i. 378; "Liber de Scon," 8, 20, 21; "Register of Glasgow," i. 62.

corn from certain lands.[18] To the same abbey Alexander II. grants other lands, subject to a yearly *Reddendo* of 40 chalders of good corn and 60 of good beer, and the Isle of Scone, in return for a payment of a stone of wax annually.[19] Malcolm gives it 20 *solidos* of his rent of the burgh of Perth and 10 of the rent of his mills there for the lighting of the church.[20] William gives a tenth of his fishings in the Tay.[21] To Henry Bald he grants a tenement in Perth in return for a pound of pepper yearly, and one to another person for an annual *Reddendo* of two chaplets of iron (*duos capellos ferri*).[22]

These are examples of the royal revenue in the form of rents or dues derivable from the *demesne* of the crown. Another source of revenue was the customs levied on merchandise. The exaction of this form of the old *Can*, as it is called in the early charters, appears as far back as the reign of Alexander I. The customs on ship-borne merchandise is frequently mentioned in David's charters.[23] Another name for duties on merchandise is *Toll*, which is also of ancient date. It appears as early as the reign of King Edgar,[24] and in a number of David's charters. A considerable number of exported and imported articles was subject to these duties.[25] Customs were, moreover, levied on goods sold in the burghs.[26] A considerable revenue was further derived from fees for writs, fines, and escheats, as well as from the usual feudal casualties. Finally, the king had the right to an aid (*auxilium*) from his vassals which in the early charters seems to have been equivalent to the ordinary dues of *Can* and *Conveth*.[27] From the reign of Malcolm IV. it appears as a regular land tax,[28] and in that of William it is referred to as the *Geldum Regium* which is payable from the lands, including those

[18] "Liber de Scon," 10.
[19] *Ibid.*, 39, 46.
[20] *Ibid.*, 11.
[21] *Ibid.*, 11, 17.
[22] *Ibid.*, 28, 29.
[23] "Early Scottish Charters," 62, etc.
[24] *Ibid.*, 17.
[25] Innes, "Sketches," 230 f. The Assisæ de Tolloneis ("Acts," i. 666 f.) gives details of these duties, but it is of questionable date.
[26] Assisæ David, 29; William, 40.
[27] "Early Scottish Charters," 60, 117; Lawrie, "Annals," 154.
[28] "Liber de Scone," 13.

held *in elemosina*, or frankalmoign, of the kingdom of Scotland.[29] On special occasions an extraordinary aid might be asked by the king of the barons, and granted, if they thought fit, as in the case of the raising of the sum payable by William to the King of England in discharge of the claim to the overlordship of Scotland consequent on the Treaty of Falaise.[30] An aid was also exigible for the knighting of his eldest son and the marriage of his daughter.

The revenue derived from these sources was collected by the Sheriffs and other local officials (bailies), and was transmitted to the king's Exchequer. The Chamberlain was assisted in the audit of the accounts by the Chancellor and by two other Auditors—" persons of substance and discretion "—appointed by them. For this purpose the Court of Exchequer was held once a year in a definite place " for the people's convenience," and to it the Sheriffs and other lesser officials were to be summoned forty days before the meeting to give an account before the Auditors of all sums owed by them. The Court derived its name from the table covered with a green cloth, divided into squares, with counters for the calculations of the auditors. These accounts as well as charters and other documents issued from the Chancery were kept under the charge of the Clerk of the Rolls, " in order that the king may know the fees and farms due to him from his realm in their entirety." The Inventory of 1292 mentions twenty-three rolls of these accounts of sheriffs, bailies, " farmers," thanes, burghs, and others classified apparently under these headings. From others mentioned in the Inventory we learn the nature of the revenues thus accounted for—rolls of rents, farms, fines in money or kind, of the proceeds of the Justice Ayres and other perquisites, of the aids imposed on the barons and their collection.[31]

The provision of supplies for the king's household was also part of the function of the Chamberlain. It was an onerous task, in view of the fact that the king and his

[29] " Register of the Priory of St Andrews," 212.

[30] There is some doubt about the particulars of this aid as related by Bower (" Scotechronicon," viii. Chap. 73) ; but the Council of magnates at Stirling in 1211, which granted this aid, is a fact.

[31] " Acts," i. 113 ; " Nat. MSS.," i. 39.

numerous retinue moved from place to place, and the Chamberlain had to arrange for the provision of supplies from the locality where he happened to be. The distribution of these was entrusted to the Clerk of the Liverance who, we are informed, "shall deal with the king's provisions and make the liverance in the hall and outside to each according to his due." In the absence of the Chamberlain he acts as his depute in everything "relating to the sustenance of the household," and the Sheriffs shall in this case be heedful of his orders in these matters. He was bound to render an account to the Exchequer of all the victuals consumed in the household and the expenditure thereon. He was further subject to the control of the Clerk of the Provender, who kept a roll of the king's retinue and checked the day's liverance every evening. The Clerk of the Provender had also the control of the Clerk of the Wardrobe and the Clerk of the Kitchen. He was evidently a very responsible official, and his power of control over the expenditure of the household was similar to that exercised by the Clerk of the Rolls in the case of the Chancery and the Exchequer. The Clerk of the Wardrobe had charge of the king's jewels, vestments, personal treasure, and the furniture of the royal residence and of his chamber and chapel, as well as of the spices, wax, "and all manner of minor things for the king's body," which he receives in gross from the Chamberlain and for which he renders account to the Exchequer. The office of the Clerk of the Kitchen is to "see that there is no waste, that the messes are cut, of beef and mutton, as they shall be ordered, to write down when the messes shall be served for the day in the hall and outside, to answer for the beef and the mutton with the hides, fells, and other appurtenances that belong, and come to the petty account every night with the other officers." These officials [32] are to have their allowance on their own account in accordance with the evidence of the various rolls of their offices.

Next to the Chancellor and Chamberlain in importance

[32] They took their names from their office. We find in the documents of William's reign, for instance, Hugo de Prebenda, Herbert de Camera (Wardrobe). Some of them were promoted to the episcopal office.

were the Steward, the Constable, and the Mareschal. The Steward, or Seneschal,[33] is a hereditary dignitary who holds his office "of fee." His function is to order the household in counsel with the Chamberlain, and especially to note defects and suggest improvements by letter to the latter, and exercise supervision over all its officers. The holder of this hereditary office—the family of Fitzalan—ultimately gave to Scotland its line of Stewart kings. To the Constable, also a hereditary dignitary, is entrusted the guard of the king's person and of his dwelling and the maintenance of the king's peace for twelve leagues around the place where he might be in residence, known as the Verge of the Court, and with the arrest and trial of offenders within this limit. Such offenders were tried in his Court, held in the royal residence, and composed of the Steward, the Mareschal, and other officials of the household who can conveniently be present. He is the president of this Court, but the decision is the considered judgment of those present. "Law and judgment are adjudged before him," not by him, and from this judgment there should be no appeal to the king's Court. If, however, the delinquent within the Verge arrested by the Constable is a burgess, he has the right to be tried by his peers in the burgh Court. To the Constable, along with the Mareschal, further belongs the guard of the "barrace" (the lists) in duels between mounted knights—the duel of chivalry. The guard under him consisted of twenty-four sergeants, known also as Doorwards (from whom the personal name Durward, so well known to readers of Walter Scott, was derived). Half of them, with the ushers, keep guard alternately at the door of the king's chamber, and after vespers the whole of them were on duty throughout the night, except those drafted to guard prisoners When the king moved through the country the whole guard marched in front of the Constable in place of the macers.

The function of the Mareschal in time of peace was the care of the king's table and the due ceremonial to be observed

[33] The term *Dapifer*, butler, was used for Seneschal up to the beginning of the thirteenth century, when it was discarded by Walter Stewart for that of Seneschal. Anderson, "Early Sources," ii. 441.

in the royal residence. "It pertains to him or his deputy to array the hall in honour of the king, and at the table he shall arrange the eaters after the king's table is set at the discretion of the Steward and Constable." In time of war he deals in his court-martial with all offences committed under the banner.

Finally, the Almoner has charge of the king's hospitals, in which his old servants and poor bondmen are maintained, and is responsible for the conduct of those who manage them. These hospitals the Chancellor is to visit once a year, free of charge.

Of the officials outside the household, the position and function of the Justiciars and the Sheriffs are particularised. The Justiciars are three in number—one for Lothian, one for Galloway, and one for Scotland proper, *i.e.*, the region between the Forth and the Grampians. The author of the document is of opinion that they should be appointed to their offices by the advice of the magnates. Their office is to dispense justice throughout the land in all cases not dealt with in the king's Court, and they are to hold their circuit Courts or Justice Ayres twice a year, once at the season of the grass and once at the season of the winter sowing (spring and autumn). They are further to appoint coroners for whom they shall be responsible, and to exercise supervision over the administration of the Sheriffs and the sergeants of fee, summoning them to their bar and presenting their defaults to the king as supreme judge. They must be experts in the law, do impartial justice to rich and poor, and maintain the king's right in all points appertaining to the crown, so that no grievances, through their default, should be presented to the king, except such as could only be redressed by him in person. The same qualification is necessary for the office of Sheriff (*Vicecomes*), who, in the opinion of the scribe, should be elected by the good people of the county, and who combines administrative with his judicial duties in connection with escheats and the collection of the revenue within his sheriffdom, with the assistance of the bailies (also termed Mairs [34]) of the bailiwicks into which

[34] "Acts," i. 378, where the *Mari Galwidiæ* are mentioned.

it was divided. In view of his fiscal responsibility the Sheriff had to be a man of substance, in order that his property might be seized in case of defalcation. The number of sheriffdoms at this period in the region between the Moray Firth and the Forth is given in another document in the same MS. as twelve, corresponding to the later counties.[35] In Lothian and Galloway there are thirteen. Nothing is said about those in the more remote Highlands. It also gives the revenue derived from these twenty-five sheriffdoms, amounting to £8099. 14s. 10d.[36]

The Justiciars and Sheriffs are frequently mentioned in the charters of David and his successors along with the earls, barons, and others to whom these charters are addressed. Unlike the Chancellor and other household officials, they appear to have been, as a rule, laymen, not churchmen. Both seem to have been the feudal successors of the *Judices* of the Celtic period, though they only gradually displaced these officials. Both were persons of high rank and great influence. In David's reign, for instance, the Justiciar of Scotland (north of the Forth) was the Earl of Fife, who is designated *Magnus Judex in Scotia* (Chief Judge in Scotland).[37] In the reigns of Alexander II. and III. the office was held by the Earl of Buchan,[38] and in the thirteenth century it seems to have been vested, for the most part, in the Comyn family. In the beginning of this century the Earl of Dunbar also appears as Chief Justiciar of Scotland (*summus justiciarius totius regni Scottorum*),[39] whilst Roland, the head of the princely family of Galloway, holds this office, as well as that of Constable, in this region.[40] Unlike those of the Steward and the Constable, the office of Justiciar was not hereditary. Although the Cambridge manuscript speaks of justiciars of fee, this seems to imply only that

[35] The term county was already in use in the thirteenth century, as in the case of the county of Lennox, "Acts," i. 96.

[36] "Scottish History Society Miscellany," ii. 25; *cf.* the data given in the "Exchequer Rolls of Scotland" from 1269 onwards, vol. i.

[37] "Early Scottish Charters," 67.

[38] Lawrie, "Annals," 363, 369; "Acts," i. 407, 426.

[39] Lawrie, "Annals," 320.

[40] "Acts," i. 378; Lawrie, 326.

the office may sometimes have been granted as a fief for life, or for a fixed term.[41]

The Justiciars and the Sheriffs were the dispensers of justice in civil and criminal causes outside the king's Court, in which justice in special causes was, as we have seen, dispensed by the king, his great officers, and his magnates. The introduction of these officials marks the attempt on the part of the king to systematise the administration of justice and, in the case of the Sheriff, to ensure the more efficient collection of the royal revenue, and thus bring the power of the crown to bear more directly, through officials responsible to it, on the government of the country. It was an essay in centralisation which was all the more necessary in view of the extensive local jurisdiction exercised, under the feudal system, by the magnates and the greater free-holders. The royal officials were a certain check on the abuse of this delegation of power to individuals, though ultimately it was to prove all too feeble a restraint on the independence of a turbulent nobility. It betokened, too, an improved fiscal policy, for the Sheriff was responsible for the collection of the royal dues by subordinate officials, and was bound to render an account of the dues so collected to the Chamberlain.

The term Sheriff is derived from the Anglo-Saxon *Scirgerefa*, the Latin equivalent of the vernacular term being *Vicecomes*, the Norman *Vicomte*, which, as applied to the *Gerefa*, came into vogue in England as a result of the Norman Conquest. Reliable documentary evidence for the introduction of this official into Scotland does not go further back than the reign of Alexander I.,[42] for the use of the term *Vicecomes* in a grant made by Macbeth to the Culdees of Lochleven is evidently a later addition. One of the witnesses to the charter in which Prince David founded the Abbey of Selkirk in this reign (1120) is Gospatrick, *Vicecomes* of (apparently) Roxburgh. Four years later David became King of Scotland, and in a number of the charters of his reign mention is made of both the Sheriff and the sheriffdom,

[41] Maitland Thomson, "Public Records," 137.
[42] "Early Scottish Charters," 28.

such as Norman, Sheriff of Berwick; Gilbert, Sheriff of Stirling; Durandus, Sheriff (apparently) of Haddington.[43] From other sources we learn that sheriffships were established by him at Scone, Edinburgh, Forfar, Aberdeen, Inverness, and Linlithgow.[44] At each of these places there was a royal castle, which was the capital of the sheriffdom, and in which the Sheriff held his court. Besides his judicial function, he was responsible, with the barons of his sheriffdom, for the military muster of the inhabitants, and was their leader in war. He took the place of the old Celtic *Judices*—the Tóisech, later known as the Thane, the Brehon, the Deemster, and the "Lawmen" (Logmen) of the Norse settlements in the Western Isles.[45] But the supersession was only very gradual, and these officials long survived as the assessor or subordinates of the Sheriff. "The *Judex*," says Mr Malcolm, "continued to act in the courts of justiciar, sheriff, baron, and of churchman throughout these centuries (1300-1600). Originally the sole judge and expounder of the tribal laws, and incorporated by David in his legal scheme, the *Judex*, before finally falling to a humble office, had sat along with the Sheriff and other judges in their courts, probably as assessor, his presence valuable both for his knowledge of customary law and of the vernacular; and it was he, and not the Sheriff, who pronounced the doom. Until 1429 the Dempster was styled in all records *Judex*." [46]

William the Lion created four additional sheriffdoms—those of Banff, Kincardine, Ayr, and Nairn. The sheriffdom of Crail was converted into that of Fife, while shortly after his death Scone was merged in that of Perth. His successor, Alexander II., added those of Peebles, Selkirk, and probably Dumfries. Wigtown was added by Alexander III., Bute, Kintyre, Lorne, and Skye by John Baliol, and Argyll by Robert I.[47]

Some of the laws of David and William contain

[43] "Early Scottish Charters," 97, 101, 115.

[44] Malcolm, "The Office of Sheriff in Scotland," *Scot. Hist. Rev.*, January 1923, 131.

[45] *Ibid.*, 134-138.

[46] Malcolm, *Scot. Hist. Rev.*, April 1923, 230.

[47] *Ibid.*, April 1923, 222 f.

regulations relative to the jurisdiction of the royal courts. David ordains that the sheriff court shall be held after notice duly given (forty days), and that the bishops, earls, and lords of the sheriffdom shall attend it, under penalty for absence without lawful cause.[48] This was in accordance with feudal practice which required the vassals of a lord to give suit attendance in his court. The Justiciar and Sheriff take cognisance of the pleas pertaining to the crown —"the Four Points of the Crown," as they were called (murder, fire-raising, rape, and robbery), which were usually reserved in the grant of jurisdiction.[49] Compurgation—the corroboration of the accused's oath by the oaths of others—still appears as the method of meeting a charge of theft, larceny, arson in these courts in David's time.[50] These compurgators formed the jury in the more primitive sense of witnesses, rather than jurors in the later sense, though there is some evidence that trial by jury in this sense (*Visnet*) was coming into existence.[51] Or, the accused might choose the ordeal by battle, might defend himself by duel.[52] The Visnet, or incipient jury, ought to be peers of the accused person, *i.e.*, an earl, baron, baron's vassal, burgess, shall be judged by those of the same rank, though those of a higher rank might sit in judgment on those of a lower.[53] The law of compensation to the king and the injured person and his kindred, in case of assault in the king's Court or any place in the king's peace (*Gyrth*, sanctuary), still holds good.[54] No Sheriff may intromit in any suit outwith his sheriffdom, and no one dwelling outwith the sheriffdom may seize and distrain the goods of a person living within it, without the Sheriff's leave.[55] Both the Justiciar and the Sheriff, as the king's representatives, have the right to be present in the feudal courts. They must, however, withdraw during the hearing

[48] "Acts," i. 322. On the subject of suit or attendance at the sheriff court, see Hamilton Grierson in *Scot. Hist. Rev.*, October 1916.

[49] "Acts," i. 319. The Sheriff, it appears, could only do so with the permission of the Justiciar. Malcolm, *Scot. Hist. Rev.*, January 1923, 138, 141.

[50] "Acts," i. 317 f.

[51] *Ibid.*, 318, 325.

[52] *Ibid.*, 317, 318, 321.

[53] *Ibid.*, 318.

[54] *Ibid.*, 320.

[55] *Ibid.*, 319, 322.

of the case by the lord and his vassals, and only be called in to hear the judgment delivered in their presence.[56] In cases when the lord has jurisdiction of life and death, and the parties agree to an accommodation (*concordia*), the agreement is subject to the king's consent as expressed apparently by the Justiciar or the Sheriff present in court.[57] No one may appeal from a lower court to the king, except in the great pleas pertaining to the crown, unless his own lord or the Sheriff has failed to do him justice, though an appeal was allowed from the feudal courts to those of the king in case of miscarriage of justice. In the case of a claim by an heir to possession of the estate of the deceased owner, a brief is to be issued from the Chancery to the Sheriff directing an inquiry to be made by a jury of the locality (brief or suit of mortancestry and novel disseisin). Only after inquiry in an assize held for the purpose and verdict given, can the heir enter into possession.[58] Here we have the incipient trial by jury in the later sense.

A pleasing feature of these trials is the royal solicitude for poor and weak suitors who are placed under the king's special protection. The officers of the law are to see that this protection shall be enforced against those who steal anything belonging to them and, if anyone can be found to swear on the holy altar in the presence of worthy witnesses that he knows the thief, the stolen goods shall be returned, "as if it were the king's own property."[59]

A striking example of the antique and rudimentary character of this legislation and its administration is the quaint law relative to the wilful killing of another man's dog. "The king ordains that if any man kills another man's dog through villainy or contrary to law, he shall keep watch on that man's midden for a twelfmonth and a day, or shall answer for all the scaith that befalls him within

[56] "Acts," i. 317-318. The right is mentioned in a charter of David relative to the jurisdiction of the Court of the Abbot of Dunfermline, "Early Scottish Charters," 83.

[57] *Ibid.*, 319.

[58] "Acts," i. 325; *cf.* 318. It is, however, questionable whether this enactment is to be ascribed to David. Neilson, "Trial by Combat," 108-109.

[59] "Acts," i. 324.

that year and a day for lack of his watch-dog, without any manner of gainsaying." [60]

Compurgation and the ordeal appear also in the laws of William. The *Wergeld* is still in force, and there are also traces of the law of retaliation or private vengeance.[61] There is, however, appreciable evidence of the tendency to substitute for both compurgation and the judicial ordeal trial by Visnet before the king's judges, which was a step towards the later jury. William, whose reign extended to close on fifty years, was an energetic reformer, and the laws ascribed to him are mostly, as in the case of David, of the nature of "dooms" or judgments of his judges, which he and his Council translate into legislation.[62] The Visnet, or jury, took into consideration the evidence of the people of the neighbourhood bearing on the case in question in giving its verdict, and was not there merely to bear witness on oath (compurgation) to the innocence of the accused. It was open to a Galloway man to refuse to be tried by the old laws of Galloway and demand trial by Visnet.[63] Trial by the judicial ordeal, though still in vogue, might be refused in cases of theft and theftbote (*i.e.*, compounding or sharing with the thief) when the evidence of the grieve or bailie (*præpositus*) and three leal men of the township was strengthened by that of three of the elder men. In this case the thief shall be summarily hanged.[64]

There is, moreover, an evident attempt to check lawlessness by strengthening the jurisdiction of the royal judges and their supervision over the feudal courts. It is, for instance, enacted by the king and the magnates at Stirling in 1180, that no baron may put anyone to the ordeal of battle, water, or hot iron unless the Sheriff or his bailie be present "to see justice truly observed as it ought to be." [65] In the same statute David's injunction that no baron or freeholder shall hold court unless the Sheriff be present "to see that the court is rightly conducted" is renewed, and the

[60] "Acts" i. 325. [61] *Ibid.*, i. 375.

[62] See, for instance, *ibid.*, i. 371, and *cf.* the statute of Alexander II. (398) which was made "by all the deemsters of Scotland before the king at Perth."

[63] *Ibid.*, i. 378. [64] *Ibid.*, 371. [65] *Ibid.*, 375.

Four Pleas of the Crown are expressly reserved. On the other hand, the bishops, abbots, earls, barons, and other free-holders are bound to attend the courts of the Justiciar and Sheriff for the trial of such pleas—due notice of forty days having been given.[66] For this purpose the Justiciar of Lothian shall hold his two chief courts yearly at Edinburgh and Peebles, and the cause for which an accused person is summoned to his court, or indeed to any court, royal or baronial, must be mentioned in the summons, "so that he or she be warned wherefore they shall answer when they shall appear at the court."[67] According to a statute made at Montrose, the Justiciars and Sheriffs of the district are required to attend on the king wherever he happens to be residing, and to remain in attendance as his assessors as long as he sojourns in the district.[68] At an assize held at Perth the bishops, abbots, earls, barons, and thanes bind themselves on oath neither to maintain nor harbour thieves, manslayers, murderers, or other delinquents, to do their utmost to bring them to justice, and refrain from accepting money to the frustration of justice. Another expedient for the repression of lawlessness is the enhancement of the penalty inflicted. In an enactment made by the judges of Galloway and Dumfries the penalty, after conviction by ordeal of battle or otherwise, for breaking the king's "peace" is fixed at the huge fine of 267 cattle.[69] The chronic revolts in this area, which extended as far north as Lanark, probably explain the enormity of the fine. Summary justice is to be dealt out to notorious criminals. Any such accused by the common voice of three or two barons, or even by one baron, of robbery, theft, or other misdeed, who is unable to find warrantors, shall straightway be hanged, or suffer the penalty adjudged by the law to his misdeed.

[66] "Acts," i. 377. [67] *Ibid.*, 380.

[68] *Ibid.*, 379. Judicially as well as politically the distinction between the regions north and south of the Forth is still strongly marked, the term "Scotland" being still limited to that north of this river. Each has its separate jurisdiction with which suitors in the courts of either must reckon. No one, for instance, living south of the Forth can poind the goods of anyone living north of it without the permission of the Sheriff of Stirling, and vice versa.

[69] *Ibid.*, i. 378.

Common fame, without due examinations made on oath is, however, not sufficient to condemn to death.[70] The treason law of William is another attempt to secure orderly government by strengthening the central power against traitors and seditious persons. If anyone is convicted of plotting against the king's life or causing sedition in the kingdom and the army, he shall suffer judgment as a traitor, and he and his heirs shall be disinherited for ever. If the sedition touches not the person of the king, but only that of his lord, he and his heirs shall be disinherited of the land held of his lord.[71] An attempt is also made to protect the lower classes from the oppression of the higher, "with which they have been troubled in times bygane," especially in the matter of providing lodging and maintenance for well-to-do travellers. Accordingly, no earl, baron, or other freeholder, travelling through the country, shall ride with more persons than he may sustain in meat and drink at his own expense, and the Sheriff, on complaint made, is to arrest and punish such breakers of the king's protection.[72] Cattle stealing is another notorious crime that frequently occupies the attention of the Justiciar and the Sheriff, and those who pursue the thief with hue and cry may do summary justice on him, if found with the cattle in his possession.[73]

In the reign of Alexander II. a distinct step in the reform of justice is made with the practical abolition of the judicial duel or ordeal by battle and the growing practice of trial by jury (*Visnet*). The judicial duel was held in the presence of the royal officers of justice on the Moot-Hill where the ordeal had been adjudged. The accused and the accuser took an oath—the former that he did not do the deed of which he was accused; the latter that the charge was true, that he himself had witnessed the deed, and that the accused was a liar. They then entered the lists or "barrace," as the ground enclosed by a palisade was called. Each swore a second time that he had not had recourse to magic to aid him in the combat. Silence having been

[70] "Acts," i. 377-378.
[71] *Ibid.*, 380.
[72] *Ibid.*, 383-384.
[73] *Ibid.*, 373.

enjoined by the officer of the court,[74] their arms—spear, sword, and targe—were handed to the combatants. After a short prayer and the benediction of the priest, the combat began and continued till one or the other yielded. If the accused gave way the gallows awaited him; if the accuser was worsted he was fated to wear all his life the calf-skin—the emblem of perjury. It was a crude and barbarous method of deciding the plea which still prevails in that survival of barbarism called war—simply the mediæval duel applied to international disputes and based on the vicious principle that mere force can decide the justice of a cause. Even in that barbarous age the duel might be stopped in three specific cases.[75] If the crime was adultery, the accused might confess and pay compensation (*Enach*). In the case of the Clan MacDuff, a fellow-clansman might separate the combatants if he could pass in the space between the accuser and his spear. If the trial was for blood drawn below the breath, the accused might "own the blood," pay compensation, and make peace.[76]

The abolition of the judicial duel in the reign of Alexander II. was the natural sequel of the decree of the Lateran Council in 1216 against it, though the appeal to battle was not explicitly abolished by the statute enacted at Scone in 1230. It was still formally recognised and might be resorted to.[77] But it was practically rendered null by the provision in the statute which made it lawful for any free-holder accusing another of robbery, manslaughter, theft, rape, or any other crime for which the duel might be resorted to, to "debel" (*Debellare*) or make good his accusation against the accused, without himself accepting or submitting to the ordeal. He could do so by averring in his accusation in the Court of the king at Stirling, or any other court, that

[74] No one within the "barrace" may speak during the ordeal except those who guard the lists, under penalty of ten cows forfeited to the king, and if anyone raise his hand, if only to make a signal, he shall be at the king's mercy. Regulations relative to the ordeal by cattle are given in the "Fragmenta" collected in vol. i. of the "Acts of Parliament," 746 f. They are discussed by Neilson in "Trial by Combat," 56 f.

[75] "Acts," i. 746.

[76] Neilson, "Trial by Combat," 117 f.

[77] "Acts," i. 402.

he will "debel" the defender by the interposition of a third party, and thus personally evade the ordeal. This he did by claiming that as a freeman he had men to prove the crime on his behalf, *i.e.*, take his place as champion, "since such persons can put forward their men in their stead." In case the pursuer was not a freeman and could not prove except by his own person, his lord might "debel" the defender by other persons on his behalf, because the body of a tenant and all his goods ought by right to be in his lord's protection.[78] Moreover, a defender in such a suit is at liberty to submit his case to a jury of leal and good men of the neighbourhood (*Visnet*), and if the jury declares him "clean," *i.e.*, innocent, he shall be quit and the pursuer shall be at the mercy of the king, or earl, or baron, according to the court in which the case is tried. If, however, the jury shall find him "foul," "righteous doom" shall be done on him. "And be it known that from this time forth," it is added, "there shall be no judgment done on him *per fossam et ferrum*;" he shall not undergo the ordeal of battle or water.[79] The inquiry into the facts of the case by jury is not only recognised in the first half of the thirteenth century. It seems to have practically superseded the ordeal. Besides the cases mentioned, it applies in that of unjust disseisin. In this case, too, the Justiciar or the Sheriff is to put the complaint before an assize of the good men of the district, and if they find that the complaint is substantiated, they shall restore the land to the plaintiff, and the wrong-doer shall be at the king's mercy.[80] It applies, further, in the trial of those of knightly rank, who "shall be judged by a jury (*Visnet*) of good and leal knights, or other hereditary free-holders."[81] In a statute relative to the indictment of all malefactors in the province of Lothian, trial by Visnet is to be generally observed.[82] Compurgation, the judicial duel, and ordeal of any kind are alike ignored.

Another evidence of progress is the enactment of

[78] "Acts," i. 400-401.

[79] *Ibid.*, i. 400. Fossam means here the ordeal of being thrown into the water. If he sank, the accused was innocent; if he did not, he was guilty.

[80] *Ibid.*, i. 400. [81] *Ibid.*, 403. [82] *Ibid.*, 403.

Alexander II. in reference to sanctuary. In those days of fist right, when law was so liable to be overridden by the strong hand or the passion of the individual, *gyrth* or sanctuary was a very necessary institution. It was a very ancient one, and reference is made to it in a statute ascribed to David.[83] It also formed the subject of ecclesiastical legislation. But it is only in Alexander's reign that we light on an enactment expressly regulating it. If a thief or robber shall take refuge in a church, and there confess his crime to a priest, he shall have sanctuary, and have the king's protection, and not lose life or limb. He shall, however, restore to the aggrieved person as much as he has taken, and shall make amends to the king, and swear on the holy relics or the Gospels that he will henceforth neither rob nor steal. If the fugitive avers that he has fled merely from dread of violence and will undertake to abide the law, he shall pass in peace to the king's court and stand his trial, to be acquitted or punished as the assize shall show. Similarly, if anyone claiming to be innocent has fled merely because he was unable to find anyone to warrant his innocence (*Borch* or *Wad*) in case of accusation, he is assured of a fair trial. Even manslayers and murderers shall only be taken from sanctuary to stand a legitimate trial.[84]

Records of trials occur in the scanty memorabilia of the reigns of David, William, and the second and third Alexanders, and some of the briefs or writs directing trial to be made in the last two reigns have been preserved. These records and briefs are concerned with both civil and criminal causes. The Chronicle of Melrose, for instance, recounts under the year 1184 the dispute between the men of Wedale and the monks regarding rights of pasture in the king's forest. The case is tried in the presence of the king, and an assembly of bishops, earls, barons, and many other good men at Crosseleize. The Constable, Richard de Moreville, and a jury of twelve leal men, swear and truly affirm that this pasture rightly belongs to the Church of Melrose, and judgment is given accordingly.[85]

[83] "Acts," i. 320.
[84] *Ibid.*, 401.
[85] "Chron. de Mailros," 93. A similar trial is recorded at p. 90.

A brief of the reign of Alexander II. gives an account of an inquisition made at Dumfries by a jury of the men of the locality, in the presence of the king's bailies, concerning the death of Adam the miller, who was killed in a quarrel with a certain Richard. After due inquiry the said men—barons and burgesses—find that Adam on a certain day called Richard a thief, and said that he would cause him to leave the town. Further, that on a certain day when Richard was passing through the town, Adam attacked him with a sharp knife, and Richard drew his sword in self-defence, and in the struggle ran him through. The jury find that Richard was a true man and that Adam was a notorious thief, and return a verdict accordingly. The next deals with the tenure of Adam of liverance of certain lands, which he holds of the king, with the object of ascertaining the services he owes to his royal superior. The king orders the Sheriff and bailies of Lanark to hold an inquisition thereanent and require the production of the charter. The inquisition is made by a number of barons and burgesses, nominated for this purpose, and these find that Adam is bound to provide two archers and a sufficient servant on horseback for making all manner of liverance to the king's household. Moreover, when the casualties of ward, relief, and marriage supervene, they ought to belong to the king. Another in the reign of Alexander III. ends with a verdict against the king. The brief is addressed to Alexander de Montfort, Sheriff of Elgin, commanding him to make inquiry by good, faithful, and free men of the sheriffdom, and by the better and more faithful of the burgesses of Elgin, concerning a feudal claim by Robert, the crossbowman, to the king's garden at Elgin and certain lands belonging to it, through his wife, Margaret. The jury finds, as the result of the inquiry, that Robert has substantiated his claim, and that the said garden and lands have descended to the said Margaret and her heirs by feudal right (*de feodo et hereditate*) in accordance with the law of the land and the testimony of sworn witnesses.[86]

[86] For these and other examples, see "Acts," i. 95 f.; Innes, "Legal Antiquities," 223 f.

CHAPTER IV

THE RISE OF THE BURGHS

THE rise of the burghs is a striking feature of the economic and constitutional history of Scotland in the twelfth and thirteenth centuries. It was during this period that these civic communities acquired an increasing importance as centres of population and trade, and attained the right of self-government which ultimately resulted, in the early fourteenth, in their recognition as an estate of the realm.

The burghal movement in Scotland was part of a general movement throughout Western and Central Europe which eventuated in their acquiring an important and distinctive place within the feudal system. With the fall of the Western Empire, the old civic life and organisation had suffered a serious blight as the result of the irruption of horde after horde of Teutonic invaders. It was long before the cities of the Western Empire regained their old importance as centres of trade and industry; still longer before such centres developed in the regions beyond the boundaries of the Empire, whence the barbarian invaders had migrated. From the early twelfth century onwards, however, there was a marked development of civic life and organisation all over Western and Central Europe. Throughout this area the old Roman cities emerge into new life, and the walled village of Germany expands into the growing town. The main factor of this revival and this growth was economic. In the long interval from the sixth to the eleventh century, when the nascent feudalism was taking shape in Western and Central Europe, the economic unit was the domain rather than the town. Land was the chief source of wealth; agriculture the main industry. The vill or village was largely identical with the domain, in which the freeman

had gradually sunk to the condition of the serf, and only comparatively few of those vills developed into important centres of population. The inhabitants were agriculturists rather than artisans or traders. They cultivated the land around the village. Some of them plied, in addition, the crafts necessary for the simple wants of the community. Only those situated at some favourable point on a large river or a main highway acquired importance as centres of a larger economic life. From the eleventh century onwards a transformation began to make itself felt in the revival of commerce and industry. Land was ceasing to be the only source of wealth. A spirit of enterprise began to stir the stagnant world. An economic revival was the result of this enterprising spirit which found an outlet not only in the crusades, but in the development of commerce and industry to which the crusades gave a powerful impulse by bringing the east and the west into contact, and fostering a thriving trade in the Mediterranean ports and between these and the interior. Hence the rise all over Central and Western Europe of vigorous civic communities in Italy, Germany, France, Spain, the Low Countries, and England, which in the twelfth and thirteenth centuries attained, frequently after a stiff struggle with the local lord, a corporate organisation, with a recognised status, chartered rights and privileges within the feudal system.[1]

The same process of civic development is observable in Scotland during this period, though not so distinctively and dramatically as in the case of, say, France and Germany. There the revolution that secured chartered rights to these expanding communities was often the result of the forcible self-assertion of the burgesses in conflict with the local magnate, whether lay or cleric, who clung to his feudal jurisdiction and regarded the new spirit of turbulent self-assertion as an unwarranted encroachment on inherited privilege. As we have noted, the existence of civic centres to which the term *oppidum* and even *civitas* was applied is dimly discernible in North Britain in the Celtic period. Bede, for instance, speaks of Alclyd (Dumbarton) as a

[1] See MacKinnon, " History of Modern Liberty," i.

civitas Britonum,[2] and the term is applied in other early records to places like Brechin. But these centres of population in non-Roman Britain must have been a very elementary form of the Roman *civitas* or city—a mere cluster of huts around the fort of a king or local chief, like the Teutonic walled village which subsequently, in the early feudal period, developed into the thriving town. As in Anglo-Saxon England, the villa or township was an ancient form of organisation among the Celts, and with the tendency towards feudalism these vills appear to have been transformed into manors. In England, as the result of this transformation, the vill in the early feudal period became as a rule identical with the manor (*manerium*) as the unit of organisation and, according to Pollock and Maitland, the old township moot was merged in the court of the feudal manor.[3] In some districts like Cambridgeshire, however, several manors appear in one township, and in such cases the township organisation would seem to have retained its distinctive existence. Vinogradoff thinks that it was completed rather than displaced by the manorial court.[4] In North Britain the vill or township similarly appears in the earliest extant charters in the eleventh and early twelfth centuries as equivalent to the domain or manor.[5] Many of these vills seem to have been also villages or hamlets in which the dwellers on the manor lived, and the more important of these had already at the beginning of the twelfth century developed into burghs. The "burh" becomes prominent in Anglo-Saxon England during the Danish invasions—the stronghold built in defence against the invaders, which, with its market, became in time a centre of trade and industry. In North Britain the "burh" erelong also makes its appearance as such a centre. Important strategic places like Berwick, Roxburgh, Edinburgh, Stirling, and Perth would naturally serve as strongholds in case of English or Danish invasions, and such "burhs" may well have owed their rise to this circumstance. Others, which developed

[2] "Hist. Eccl.," i. 1 and 12.
[3] "History of English Law," i. 599 f.
[4] "Growth of the Manor," 304-305.
[5] "Early Scottish Charters," 7, 11, 27, etc.

from the simple vill or township of an earlier time, grew up around the king's residence, such as Dunfermline, Linlithgow, Forfar, Elgin, or around the seat of the bishop like St Andrews, Glasgow, Dunkeld, Aberdeen, or the foundation of the religious orders, such as Kelso, Melrose, Selkirk, or the castle of some great baron. St Andrews was a vill before it became a burgh,[6] and in some of the burgh charters the term vill is still applied to the burgh.[7] Certain it is that the burgh did not take its rise in the reign of David, far less in that of William the Lion. At the beginning of David's reign a number of burghs are already in existence. Even before he became king, in a charter in which, as Earl of Lothian, he founded the Abbey of Selkirk, he speaks of the burghs of Berwick and Selkirk.[8] In another, conveying a grant to the Church of Dunfermline shortly after his accession, he mentions those of Perth, Stirling, Dunfermline, and Edinburgh.[9] In others belonging to this reign, Elgin, Aberdeen, Crail, Linlithgow, Haddington also appear as burghs, and from the charter of William confirming the customs and rights of Rutherglen, we learn that this burgh was in existence in his grandfather's time.[10] In the "Leges Burgorum" we hear of "the manorial custom of all the burghs of Scotland,"[11] which points to a burghal organisation, of which customary law took cognisance before the reign of David. David, doubtless, added to their number by grants to various communities, though none of the charters in which he made these grants are extant. The only surviving charters of this reign founding a burgh are those of St Andrews and the Canongate. These were clerical foundations. St Andrews was made a burgh by Bishop Robert in 1144, the Canongate by the Canons of the Abbey of Holyrood nearly twenty years earlier. In both cases the Bishop and the Canons were empowered to do so by the king, and from these examples it would appear that

[6] "Early Scottish Charters," 133.

[7] William's Charter to Rutherglen, for instance, "Acts," i. 86.

[8] "Early Scottish Charters," 27.

[9] *Ibid.*, 53.

[10] "Acts," i. 86.

[11] "Leges," 55; *cf.* 49. The numbers refer to the pages, not those of the laws, in Innes' edition.

burghs could only be created by the royal authority, direct or delegated. "Be it known that with the licence of David our king, I have constituted St Andrews a burgh, and that with the king's consent I have made Mainard the Fleming provost (*præfectus*) of this burgh." [12] Similarly, in 1126 the king empowers the Canons of Holyrood to found the burgh of Canongate on the land lying between Edinburgh and the Abbey.[13] The Bishop of Glasgow, which, though a bishopric in David's reign, was subject to the jurisdiction of the burgh of Rutherglen, only obtained the right to constitute his episcopal seat a separate burgh from William the Lion. "Be it known that I have conceded and have confirmed in this my charter to St Kentigern and Joceline, Bishop of Glasgow, and to each of his successors for ever that they may have a burgh at Glasgow." [14] Besides St Andrews and Glasgow, other episcopal seats—Dunkeld, Dunblane, Brechin—erelong appear as burghs, and the heads of great religious foundations like Kelso, Jedburgh, Melrose, Selkirk, Paisley, vied with the bishops in raising the expanding communities which grew up around their abbeys to burghal rank. Some of them also grew out of the villages which were included in the lands granted by David and other kings to some magnate: Renfrew and Lochmaben, for instance, which David had given to Fitzalan and De Brus respectively. These were known as burghs of Regality and Barony.[15]

In Scotland, as on the Continent, the main factor of burghal development seems to have been the economic one. When at the beginning of David's reign these civic communities loom into history, their emergence bespeaks an appreciable development of trade and industry in the previous 100 years at least, and there is some evidence that this was the case. The reign of Macbeth, despite the unfavourable picture of the later chroniclers from whom Shakespeare took his delineation, seems to have had a beneficial effect on the economic life of the people. "Great plenty," notes Wyntoun, "then abounded both on land

[12] "Early Scottish Charters," 133.
[13] *Ibid.*, 119. [14] "Registrum Glas.," i. 36.
[15] Introduction to vol. i., "Exchequer Rolls," 80-81.

and sea." There are indications in Turgot's "Life of Queen Margaret" of a marked advance in industry and commerce in that of his successor, Malcolm III., and in those of Edgar and Alexander I. a considerable revenue seems to have been derived from the tolls or customs on the ships frequenting the ports of the east coast.[16] There was evidently a considerable commerce from and to these ports at the beginning of the twelfth century, and this commerce must have reacted favourably on the industry which supplied articles of export such as fish, hides, wool, furs. The fact of a growing trade and industry becomes more patent in the reigns of David and his successors. David's biographer, Ailred of Rievaulx, testifies to the remarkable expansion of both in his reign. "Scotland," he tells us, "was no longer a beggar from other countries, but of her abundance relieving the wants of her neighbours—adorned with castles and cities, her ports filled with foreign merchandise and the riches of distant nations."[17] Though this, as the judgment of a panegyrist, is to be accepted with a grain of salt, it is doubtless comparatively near the truth. Flemish merchants not only traded with Berwick and other ports, but settled in this and other burghs along the east coast, such as Edinburgh, Perth, and Inverkeithing,[18] and to this influence is due in no small measure their advance. A Fleming who had been a burgess of Berwick became, in fact, the first provost of St Andrews, and we read of another, Peter the Fleming, holding a toft, or tenement, within the burgh.[19] The twelfth century biographer of St Kentigern incidentally mentions the thriving fishing industry which attracted fishermen not only from England, but from Flanders and even France, and of which the May Island, at the mouth of the Forth, was the centre.[20] We hear in David's charters to Dunfermline Abbey of the production of salt, iron, and even gold.[21] From those of William it

[16] "Early Scottish Charters," 17, 43.
[17] Cochran-Patrick, "Mediæval Scotland," 107.
[18] Introduction to "Exchequer Rolls," i. 82.
[19] "Register of St Andrews," 139.
[20] "Vita Kentigerni," Chap. 7 (ed. Forbes).
[21] "Early Scottish Charters," 61, 65, etc.

is evident that cloth-making was already in vogue in his grandfather's time. Berwick was already a thriving port, the chief centre of the export and import trade. The number of its vessels was considerable, and we hear of one burgess who could fit out as many as fourteen in an emergency. In the middle of the thirteenth century the chronicler of Lanercost enthusiastically describes it as "a city so populous and of such trade that it might justly be called another Alexandria, whose riches were the sea and the waters its walls. In those days its citizens, being most wealthy and devout, gave noble alms." On the east coast Leith, Inveresk (Musselburgh), Inverkeithing, Perth, Dundee, Montrose, and Aberdeen, in the west Ayr (from the time of William), also appear as thriving seaports. Agriculture was the chief industry, and the monasteries founded by David gave a great impulse to its development. The monks were traders as well as agriculturists, and their ships engaged in foreign as well as coastal trade.[22]

It was as the result of this economic advance that the burghs emerge from the clair-obscure of an earlier time into the clear light of history in the twelfth and thirteenth centuries. Their growing importance as centres of commerce and industry led to the recognition of ancient custom and the extension of rights and privileges directly by the central authority, or indirectly by those empowered by the central authority to sanction or confer them. It was to the interest of the king or other superior to encourage their development by such special legislation. It furnished them with an appreciable source of revenue in the shape of rents and custom dues, and from the twelfth century onwards they adopted the policy of fostering these civic communities by making it the interest of the freeman to settle in the older centres of population, and establishing new ones on the royal demesne and other lands, such as those attached to a great religious foundation or held by some great magnate.

A distinctive feature of the early burgh tenure is the grant of a toft or tenement of the land on which the burgh

[22] "Early Scottish Charters," 29, 72, 131. For further details, see Cochran-Patrick "Mediæval Scotland," 104 f.

has grown up around, say, the king's castle or some ecclesiastical centre, by the king or other superior, in return for the payment of rent and certain services to be rendered by the grantee. These tenements were held by lease (*firma burgi*), and the rents were collected by the bailie (*præpositus*) of the superior.[23] The grant did not necessarily involve at first self-government, for the bailie seems to have administered its affairs as the servant and representative of the king in the case of the burghs on the royal demesne, or of the bishop or other superior in the case of non-royal burghs. But it carried the guarantee of certain customs, rights, privileges, as well as the rendering of certain services, such as watch and ward. It sanctioned the right to hold a weekly market (*Forum*), and to buy and sell free from all custom or exaction, and legal protection for their goods. It gave freedom from toll and custom on their goods in transit throughout the country.[24] This is the tenor of the rights and privileges conferred in the oldest extant charters by King David through the Canons of Holyrood on the burgh of Canongate which he empowered them to establish. The charter constituting St Andrews a burgh about twenty years later does not state the privileges conferred. That of William to Rutherglen speaks generally of the customs and rights (*consuetudines et rectitudines*) which it had enjoyed in his grandfather's time. It shows, however, that its jurisdiction obtained throughout an extensive district which is defined and which included the village of Glasgow. It further prohibits anyone from bringing anything to sell within these bounds unless it had first been brought to the burgh, and it specifies the right of the *præpositus* of the burgh to arrest, wherever found, those who infringe its rights of toll and other rights which belonged to it in David's time. In the case of Ayr, created by King William around the castle which he had erected there, the conditions are more specifically stated. The king grants all the liberties and free customs which his other burghs throughout the kingdom enjoy. He establishes a market to be held every Saturday. To all who shall come to dwell in the burgh he

[23] "Early Scottish Charters," 86, etc. [24] *Ibid.*, 118-119.

assures freedom from toll and custom for their goods. He grants to the burgh extensive lands in the neighbourhood, and to the burgesses six acres out of the waste land for each toft at a rent of twelve pennies. No one apparently could be a burgess without the possession of such a tenement. Further, all who shall come to the market to buy and sell are to enjoy the king's peace in going and returning. Toll is to be paid to the burgh at certain specified places, and no one may evade this payment on pain of arrest and forfeiture.[25]

William's charter to Perth supplies additional details which indicate a further stage of development.[26] Perth was already an old burgh, and it appears that it possessed the exclusive right of trading within the sheriffdom. Outsiders (*mercator extraneus*) may only sell their wares within the burgh. Nor may anyone keep a tavern in any township of the sheriffdom unless where the lord of the township is of knightly rank—a prohibition evidently intended to assure the burgesses the monopoly of selling drink within the county. Moreover, no outside dealer in cloth may cut cloth (for the purpose of selling it retail) in the burgh, except within a stated period of the year, extending to about three months, and no one outside it and within the county may make dyed or shorn cloth (*pannum tinctum et tonsum*) except a burgess who is a member of the merchant gild. Nor may anyone living outside buy skins or wool except at the burgh market. An interesting feature is the appearance of the merchant gild of the burgh. The burgesses are empowered to have their gild (*gilda mercatoria*) from which the fullers and weavers were excluded. The rise of the merchant gild was an important factor of the economic development which raised the towns to such a high level of prosperity and power in England, France, Germany, and the Low Countries, and its existence in the reign of William the Lion is an equally convincing evidence of the growing industrial and commercial life of the burghs in Scotland. Here, as elsewhere, its members belonged to the more opulent class of the community, which excluded the

[25] "Nat. MSS.," i. 21.

[26] "Acts," i. 86; *cf.* Assisæ Reg. Wil., "Acts," i. 383.

craftsman who worked with his own hands, among whom the fullers and weavers were evidently reckoned.

William's charters to Inverness, four in number, embody some specific privileges and obligations. No outside creditor may, for instance, distrain the goods of the burgesses for any debt except his own. The burgesses are under obligation to maintain a ditch and palisade in good repair, which the king was to construct around the town. They were not bound to accept the ordeal by battle at the challenge of anyone within or without the burgh, but might choose trial by compurgation instead. The number of such compurgators and the amount of the forfeit were reduced to one-half of that of other burgesses throughout the kingdom.[27]

William's charter to Perth is typical of the burghal organisation as it had developed by the beginning of the thirteenth century, and it would appear, to judge from the charter of Alexander II. to Aberdeen,[28] which reproduces the features of the Perth charter, to have been typical of that prevailing in the reign of his successor. The burgh is the privileged market town within the large district attached to it. It has the monopoly of commerce and manufacture within this area. It has its merchant gild, which is an exclusive corporation, and its associations of lesser craftsmen —the fullers and weavers being specially mentioned—who occupy a position of inferiority.

Nothing is said in these charters of the existence of any body for the government of the burgh. Mention is made of the king's bailies (*præpositi*),[29] who exercise a certain jurisdiction in these burghs, in the matter of collecting the king's rents and customs, for instance, and who are to assist the burgesses in maintaining rights and privileges. The charter is granted to the burgesses generally, not to any corporation. It is, however, assumed that they are entitled to take measures for the preservation of their customs and privileges, and there was evidently from an early period some organisation for this purpose. In the thirteenth century this organisation is definitely reflected in the "Laws

[27] "Acts," i. 88-89. [28] *Ibid.*, i. 87.

[29] These officials are also mentioned in some of David's charters, "Early Scottish Charters," 57, 71, 86, 208.

of the Four Burghs" and the "Statutes of the Gild." These burgh laws are supposed to have been enacted by David, and the earlier sections are identical with the customs of Newcastle, which profess to belong to the time of Henry I. But there is no real ground for ascribing their composition as a whole to David's reign, and they may only be safely used for the period of the Alexanders, *i.e.*, the second half of the thirteenth century. The statutes of the gild date in part from the middle of this century, and were drawn up by the Merchant Gild of Berwick for the maintenance of its interests and the regulation of its affairs. The gild naturally acquired a leading influence in the administration of the burgh, and in these statutes it seems almost identical with the governing body of the burgh, whose existence these documents ultimately reveal to us.

In the "Laws of the Burghs" the magistrates (*præpositi*, "aldirman and bailies" of the Scots translation) are to be chosen by the common consent of the good men of the town. They are to swear fidelity to the king and the burgesses, to keep the customs of the town, to do justice to man and woman in accordance with the constitution, counsel, and judgment of the burgesses. The town criers are also to be elected to their office and to swear fidelity to king, magistrates, and burgesses.[30] There is no mention of a town council, but the chief magistrate shall swear in twelve of the best and wisest of the burgesses to keep and maintain the laws and customs of the burgh to the utmost of their power.[31] They were evidently the sworn assessors of the magistrates in the government of the burgh, and in the "Statutes of the Gild" the council appears as a corporate body in the case of Berwick, and inferentially, in the other Scottish burghs which adopted these statutes. "We ordain by common consent that the community of Berwick shall be governed by twenty-four good men of the better, more discreet, and more trustworthy of that burgh, thereto chosen, together with the Mayor and four Bailies. And whensoever

[30] "Leges," 34-35.

[31] *Ibid.*, 54. The twelve appear in municipal documents of the fifteenth century as the *duodene* or *dusane*. See extracts from the "Records of the Burgh of Edinburgh," i. 2 f.

the said twenty-four men are summoned to meet concerning the common business, he who comes not at the summons before night shall give two shillings to the gild." The mayor and bailies are also to be chosen by the whole community, and in case of controversy over their election, they are to be chosen by the oaths of twenty-four good men elected by the community for this purpose.[32]

In the case of Berwick at least, the gild is so powerful a body that it takes upon itself to regulate the government of the burgh as if it were the authoritative legislative body within it. The reason of this authoritative action seems to be, as the first two of its statutes show, that it had come to an agreement with the other gilds to absorb them and their property in one common association.[32a] Hence the use of the term "the general gild" and the proviso that no other gild should henceforth presume to establish itself. Whether all other burghs adopted this arrangement, it is impossible to say. It would seem, however, that in all of them the merchant gild practically absorbed the burghal administration during this and the following century. On the other hand, it is equally evident that with the growth of the burghs its predominance was resented and resisted by those of the community who were excluded from its membership and its privileges, and that even if these two statutes were adopted by the other burghs, this excluded element of the population gradually formed associations or craft gilds, with their distinctive officers, in the common interest of their crafts.

A further step in the development of self-government was made by substituting for the annual rent paid by each burgess individually for his tenement to the king a fixed annual sum (the farm or *firma* of these rents) paid by the burgh collectively.

By paying this fixed annual sum to the king, the burgh thus acquired the right to all rents, petty customs, and issues of court (fines) pertaining to it, and thereby obtained a revenue for the administration of its affairs. This concession

[32] "Statutes of the Gild," 80-81.
[32a] "Leges," 64-65.

ultimately led to the grant by charter of the fee or feu farm (*feodifirma*) to the burgh in perpetuity, subject to an annual payment, which placed the burgh in the same relation to the king as the landowner who held his land in fee or feu from the crown. Aberdeen obtained its feu charter in 1319. Edinburgh followed in 1329.[33] The annual amount accruing to the Exchequer from these burghal reddenda in 1327 was £1133. 3s. 4d., of which Berwick, Aberdeen, and Perth contributed more than one-half.

From the burgh laws it appears that the burgh had from an early period its court for the trial of suits involving the burgesses. In the law ascribed to David, the burgess as well as the earl, baron, and baron's vassal is to be tried by his peers,[34] and this provision appears also in the burgh laws.[35] He could decline the jurisdiction of any other court, even that of the king, and claim to be tried in the burgh court before the alderman and bailie, though when summoned to the king's court he was bound to appear and assert his privileges, and he might be tried in this court if he did not adduce his privilege as a burgess.[36] The same privilege applied in the case of burghs of regality, the lord of the burgh or his bailie being entitled to claim the accused for trial in his court.[37] But he could not be summoned by the king's officer unless he was accompanied by one of the burgh,[38] and, in case of arrest by the king's bailie, he could not be removed to prison beyond the liberty of the burgh unless he failed to find surety for his compearance.[39] As in the case of the baron's court, the pleas pertaining to the crown were reserved from the jurisdiction of the burgh magistrate, and such cases were held over till the coming of the king's justiciar, before whom these were heard in the burgh court.[40] These justice courts were held three times a year—one after the Feast of St Michael (Michaelmas), another after Christmas, and the third after Easter—and the

[33] "Charters and Documents Relating to the City of Edinburgh," 16-17; "Exchequer Rolls," i. Introduction, 86-88.
[34] "Acts," i. 318. [35] "Leges," 6. [36] *Ibid.*, 27.
[37] "Fragmenta," appended to the "Laws of the Burghs," 177.
[38] "Leges," 53. [39] *Ibid.*, 57.
[40] *Ibid.*, 6; *cf.* Assisæ David, "Acts," i. 319.

burgesses were bound to give attendance unless reasonably prevented.[41] If the burgess was accused by an outsider he could only be tried in his own court, even if the outsider was the castellan of the king's castle.[42] Moreover, no castellan might enter the house of a burgess for the purpose of killing pigs or poultry for behoof of the king. His chattels as well as his person were strictly protected from arbitrary seizure by the royal officials, and the castellan was held bound to ask for and purchase what he needed for the king's use. If he found the pigs and poultry in the street he might seize them, but must pay the price at which they were appraised by the neighbours.[43] The burgh court was held every fortnight, and the alderman was bound to hold it unless there was reasonable cause for postponing it.[44] Summons to court is made by the bedellus, and is to be made before witnesses, the day and place of compearance and the charge being specified.[45]

Security of property was one of the objects of these laws, and several enactments are directed to ensure to the burgess the secure possession of his tenement, its transmission to his heirs, and protection from lawless deforcement.[46]

Some of these privileges or liberties, as they were called, were very hampering to trade. No burgess of one burgh could, for instance, sell bread or ale in another under penalty of a fine of eight shillings for the injury done to the rights of others, "forasmuch as none ought to encroach on the liberty of another."[47] The laws also contain complex details of the monopoly of trade possessed by the burgesses within the burgh and its district, and other privileges of this nature, of which the charters make mention.

The burgess had duties as well as privileges. He was

[41] "Leges," 19.
[42] *Ibid.*, 6, 22-23.
[43] *Ibid.*, 49-50.
[44] *Ibid.*, 23.
[45] An outline of the procedure in the case of a suit relating to the possession of a burgh tenement in the burgh court (brief, or suit of right) is given in "Acts," i. 655-656. The Scots' translation is given by Innes in "Leges," 92 f.
[46] See especially the "Fragmenta" of old laws appended to the "Burgh Laws," 164 f.
[47] "Fragmenta," 162.

liable to take his turn, in response to the summons of the burgh officer, in watching the burgh from the ringing of the curfew till daylight.[48] He was bound to pay his share of civic burdens. He might be called on to guard the king's castle for forty days.[49] He was, further, liable to serve under the bailies in the defence of the kingdom at the king's summons. If he was arrested beyond the burgh for debt or any crime, his fellow-burgesses were bound to go and bail him at their own expense, if within the sheriffdom; at his, if beyond it.[50] One burgess ought to be surety for another three times in succession, but if he lose thereby, he may cease to do so unless the other make good his loss.[51] He was, however, exempt from feudal casualties, such as merchet and herezeld,[52] and his goods could not be poinded for debt without the consent of the bailie.[53]

The privileges of the burgess included even the exemption from the judicial duel. The burgh seems in this respect to have anticipated the more equitable and enlightened conception of justice which led to the abolition of the duel in the reign of Alexander II. Before this general reform, litigants within the burgh might have recourse to the duel if they pleased. But in the "Fragments" of old laws appended to those of the "Four Burghs," William the Lion is said to have conceded that the burgesses should not be compelled to submit to the duel except in the case of the pleas reserved to the crown, and should have the benefit of the Law of Winchester, *i.e.*, the right to be acquitted by the testimony of twelve leal men.[54] In the case of litigation with outsiders, it was open to the king's burgess to refuse the challenge and have the suit tried in the burgh court. He might, for instance, decline to fight the burgess of a churchman, an earl, or a baron.[55] If a rustic who had a holding in a burgh accused a burgess of any crime, he could refuse the challenge and clear himself by compurgation. In any case, if he was beyond the fighting age, he could refuse the challenge.[56] William expressly exempted the burgesses of Inverness from

[48] "Leges," 40.
[49] *Ibid.*, 17.
[50] *Ibid.*, 25.
[51] *Ibid.*, 160.
[52] *Ibid.*, 10.
[53] *Ibid.*, 5.
[54] *Ibid.*, 163.
[55] *Ibid.*, 8.
[56] *Ibid.*, 11.

the duel in all cases,[57] and there is some evidence to show that the exemption was extended to other burghs.[58]

The burgh was, too, the pioneer of freedom for the serf who sought refuge within its walls, though there seems to have been an unfree element in its population. "If the serf of a baron, or a knight, or any other serf shall come to the burgh and buy a burgage tenement and live there for a year and a day, without challenge of his lord, he shall be forevermore a free burgess and enjoy the freedom of that burgh."[59] The conditions on which a runaway serf could become a freeman were, indeed, not very easy of fulfilment. Not only was he liable to recapture for a full year, but he must find the means to buy a tenement within the burgh. Even so, the burgh opened to him a possible way of escape from his bondage, and this bespeaks the progressive spirit, of which, if on a limited scale, it was the harbinger. On the other hand, the spirit of enterprise which was striving in these centres to break away from the rigid feudal conception of society was by no means democratic in the larger sense. The burgh was the jealous guardian of privilege and monopoly. Commerce and industry were hampered by what seem to us artificial restrictions. It had, in truth, a very limited conception of internal free trade, and suffered from an excess of bureaucratic regulation. The merchant gild, in particular, was a very exclusive body. No dyer, flesher, or shoemaker, who plied his craft with his own hands, could become a member, but only if he foreswore such manual labour and employed workmen to do it for him.[60] As we have noted, fullers and weavers were absolutely excluded. No other gild was, in fact, recognised within the burgh of Berwick,[61] and these and other craftsmen had to struggle long before they obtained a recognised place in the body politic. The gild was, it seems, the nurse of purse pride and pretension, as well as of trade and industry. As we have noted, it acquired and exercised a dominant influence on the government of the burgh. In the case of Berwick, it practically composed the Town Council, and used its

[57] "Acts," i. 89.
[58] Neilson, "Trial by Combat," 97-98.
[59] "Leges," 9. [60] *Ibid.*, 46. [61] *Ibid.*, 65.

power to further its own interests. It was not only an exclusive, but a secret society, whose members were bound on oath not to reveal its proceedings under penalty of disenfranchisement for a third offence.[62] Every gild brother worth £10 in goods must have "a decent horse" in his stable worth at least forty shillings, and if he parts with his horse by sale or otherwise, he must provide another within forty days. In case of failure to do so he shall be fined 8s. to the gild.[63] Only masters in the various trades seem to have enjoyed burgess rights. The ordinary workmen or "servants" seem to have been little better off than the serfs of the rural districts. On the other hand, the gild took a paternal interest in the welfare of its members. It provided maintenance for an indigent or infirm brother, a decent funeral at his death, and a husband for his orphan daughter.[64] It deputed several of its members to assist a brother involved in a grave suit outwith the burgh.[65]

To conserve their privileges and further their interests, the burghs entered into leagues. One of these leagues, as we learn from a charter of William the Lion, was composed of the burghs of Aberdeen and Moray and the region north of the Mounth, and dated from the days of King David.[66] It is, however, questionable whether the term *Ansum* (Hansa) in the charter is used in the sense of a league, and at anyrate it has otherwise left little trace of its existence. More famous was the Union of the Four Burghs of the south—Edinburgh, Berwick, Roxburgh, and Stirling.[67] Its court was presided over by the chamberlain, and it seems to have had legislative as well as judicial powers in all matters affecting these communities. It decided suits in accordance with law and custom, and from it emanated the code known as the "Laws of the Four Burghs."

The chamberlain's jurisdiction extended over all the royal burghs, for it was part of his function "to guide and govern them," as we learn from the thirteenth century document

[62] "Leges," 81-82. [64] *Ibid.*, 69-70, 161. [66] "Acts," i. 87.
[63] *Ibid.*, 73. [65] *Ibid.*, 70.
[67] Lanark and Linlithgow were substituted for Berwick after it became English, and Roxburgh, which was temporarily in possession of the English.

relative to the king's household. As head of the Exchequer he received the rents, aids, and customs paid by them to the crown. As we learn from the "Iter Camerarii," he or his representative held his court or ayre at stated times, and made inquisition into the administration of the burgh as well as heard suits that came under his jurisdiction. This court all the town officials and burgesses were bound to attend at the summons of the alderman and bailies. These officials included, besides the bailies, sergeants, tasters of ale, prisers of flesh, the custumars of the great and little customs, etc., who must bring with them all the instruments, such as weights and measures, used by them in the discharge of their offices. Further, the brethren of the gild, shop-keepers, and all who had any suit, both pursuers and defenders, with their sureties, were held bound to appear and submit their pleas to the judgment of the court.[68] The inquisition was a searching one, to judge from the examples given in the "Iter." Any aggrieved person was at liberty to challenge the administration of the bailies, in case they had not done impartial justice to rich and poor; had taken gifts for the purpose of evading the law; had not carried out the commands of the king or the chamberlain since the last ayre; had failed to keep sufficient watch and ward within the burgh; had not duly observed the assize of bread, ale, wine, and flesh; had made profit out of their office; or had failed to take due counsel with the community of the burgh, etc.[69] Similarly, the lower officials were liable to answer for specific grievances adduced against them in the conduct of their office. Sergeants and beadles might have to meet the charges of not presenting to the bailies all the distraints made by them; of not requiring the rich equally with the poor to take their share in the town watch; of overcharging some for the expenses of the king's justiciar or the chamberlain, and favouring others in this matter; of making profit to themselves out of such charges, etc. The ale tasters were evidently also given to certain delinquencies, one of them being "that they distend their bellies in drinking within the house when they should stand

[68] "Leges," 132 f. [69] *Ibid.*, 137.

in the middle of the street before the door (of the brewster), and should send in one of their followers with the bedellus to choose what pot he will taste, which he should present to his fellows, and thereupon decide after due trial." [70] Similarly, all engaged in the various crafts—fleshers, bakers, brewers, millers, wine merchants (taverners), fishermen, dealers in wool, hides, and skins (hucksters), shoemakers, skinners, tailors, weavers, maltsters, saddlers, are liable to the inquisition, the object of which is to secure honest dealing and a genuine article at a reasonable price, even at the risk of encroaching somewhat drastically on the economic liberty of the subject.

[70] "Leges," 139.

CHAPTER V

THE EARLY MEDIÆVAL CHURCH AND ITS CONSTITUTION

DURING this period the Church as well as the State was feudalised. The ecclesiastical reformation initiated by Malcolm III. and Queen Margaret was carried to full fruition by their son David and his successors, and brought the cultus, government, and institutions of the Church into line with those of western Christendom.

The Anglo-Norman influence which moulded the institutions of the State from the end of the eleventh century onwards was equally potent in moulding those of the Church. Celtic custom and practice were finally superseded, and the organisation and government of the Church took shape in accordance with the canon law and the feudal system. The development of the episcopate, the rise of a parochial clergy, the establishment of the monastic orders, the erection of the great cathedrals and religious houses, the endowments which made these things possible are the more striking features of this ecclesiastical transformation.

At the beginning of the period there was only one bishop of the Scots, with his seat at St Andrews. The early bishopric of Glasgow had long disappeared. Whithorn, or Candida Casa, which had survived longer as the seat of an Anglican bishop, had also lapsed. Alexander I. is credited somewhat doubtfully with the creation of two additional sees—those of Moray and Dunkeld—and there is some reason to give his brother, David, the benefit of the doubt.[1] David, as Prince of Strathclyde, revived the See of Glasgow some years before he became king, and during his reign he certainly founded five others—Ross (Rose-

[1] "Early Scottish Charters," 282-283.

markie), Caithness, Aberdeen, Dunblane, and Brechin. Fergus of Galloway revived that of Candida Casa, which was ecclesiastically subject to York, and thus before the end of David's reign the number of bishoprics had grown to ten. Towards the end of William's reign an eleventh was added by the disjunction of Argyll from Dunkeld, afterwards known as the See of Lismore.[2]

Malcolm III. and Margaret, Edgar and Alexander I. granted lands to the Church and enriched the monasteries of Loch Leven, Scone, Dunfermline, and Coldingham. But it was in the reign of David that the monastic movement became distinctive and the foundation of religious houses appears, along with that of bishoprics, as an integral part of ecclesiastical policy. Already, as Earl of Lothian, he founded the abbeys of Selkirk and Jedburgh. During his reign ten others were added—Kelso, Holyrood, Melrose, Newbattle, Dundrennan, Cambuskenneth, Holme Cultram (in Cumberland), Urquhart, Kinloss, Dryburgh, Lesmahagow. Malcolm IV. founded Coupar-in-Angus; William the Lion, Arbroath; Alexander II., Balmerino and Pluscarden. Others, such as Lindores, Paisley, Saddell, Iona, owed their foundation to the zeal of some magnate. David, Earl of Huntingdon, grandson of King David, founded Lindores, for instance; Alan, son of Walter the Steward, Paisley; and Reginald of the Isles reconstituted Iona.

These bishoprics and religious houses were profusely endowed by David. The monastic chroniclers extol his liberality, and the charters of his reign show that their encomiums were amply founded. In virtue of these grants the bishops, abbots, priors, as we have noted, became feudal magnates, holding their lands of the crown. Sometimes these grants are made in the form usual in secular grants. Frequently the land was granted in free alms, with few or any restrictions in the matter of rents and service, unless explicitly specified. The higher clergy accordingly became an influential order in the State, holding important offices, such as that of chancellor, and taking an influential part in the transactions of the King's Council and acting as royal

[2] On these foundations see Skene, "Celtic Scotland," ii. 365 f.

emissaries. In virtue of their position as feudal magnates and also of their ability and education, the higher clergy —bishops, abbots, priors—appear with the earls and barons as a recognised Estate of the realm long before the development of the parliamentary constitution and the recognition of the clergy generally as one of the Three Estates

These grants, whether by the king or other donors, were not State endowments, but free gifts to the Church to be held by it in accordance with the terms of the grant, apart from any claim to control on the part of the State. The only function of the State was to see that they were held and used in accordance with the conditions of the grant. They carried jurisdiction over the inhabitants of the land conveyed. As a feudal magnate, the bishop or abbot exercised jurisdiction in secular suits in his court like other vassals of the crown, and the extent of this jurisdiction varied in accordance with the terms of the charter. In addition to the usual baronial powers (*Sac* and *Soc*, etc.),[3] they were invested in some cases with the judicial power of life and death.[4] The charter of Alexander I. to Scone and that of David to Holyrood include the right of the judicial duel as pertaining to the court of the abbot.[5] In certain charters an appeal from the court is allowed to that of the king,[6] and the sheriff is entitled to be present to see that justice is done.[7] As a general rule, the pleas of the crown were excepted, as in the case of the courts of lay vassals and in suits involving life and death, and it seems that the judicial function in the trial of lay delinquents, guilty of crimes involving the death penalty, was usually exercised by the ecclesiastical bailie or steward.[8] "No churchman," we read in the enactments of Bishop David of St Andrews, "shall write or dictate a sentence involving bloodshed." [9]

[3] See, for instance, David's grant of Coldingham and other lands to the monks of St Cuthbert, 54-55.

[4] "Regiam Majestatem," i. 2.

[5] "Early Scottish Charters," 45, 116.

[6] *Ibid.*, 62, 169.

[7] *Ibid.*, 83.

[8] Dowden, "Mediæval Church," 286.

[9] Patrick, "Statutes of the Scottish Church," 65.

The grants to the Church included tithes or teinds (*decimæ*). These were mainly derived from grain or agricultural produce. But in King David's charters they embraced a large variety of objects—animals, fishings, huntings, burgh rents, ships' cargoes, escheats, pleas, mills, coal, salt, and iron, and some of these are referred to as forming part of the *Can* or royal revenue, of which a tenth is granted to the ecclesiastical beneficiary. Besides such voluntary grants by charter, tithes were by canon law leviable on all produce, for the right to exact the tithe was based on divine authority (*jure divino*). Pope Alexander III. in 1161, for instance, commands the people of the diocese of Glasgow to pay tithes to the bishop which are due by canonical right,[10] and the right was recognised by the civil power. Malcolm IV., William the Lion, and Alexander II. issued injunctions to the royal officials to enforce payment, which was often refused and usually difficult to obtain.

Before the twelfth century, parishes in the sense of a local administrative or ecclesiastical area were unknown in Scotland. The term appears in the sense of a diocese, and it is so used of the extensive region of Strathclyde or Cumbria, the ancient See of Kentigern, revived by David I.[11] In the earliest charters we hear of vills, shires, churches, but not of parishes. King Edgar, for instance, about the year 1100, grants the "vill" of Swinton in the "shire" of Coldingham to the monks of St Cuthbert.[12] Shire in this early sense was a much smaller territorial division than the later shire or county over which a sheriff had jurisdiction. Besides Coldingham, we hear, for instance, of the shires of Kirkcaldy, Gatemilk, and Gellald within the sheriffdom of Fife,[13] and of the shires of Clatt, Tullynessle, Rayne, and Daviot within that of Aberdeen. In this original sense it seems to have corresponded to the parish. But we first hear of the parish in David's charter to the Canons of Holyrood, in which he speaks of "the Church of St Cuthbert at Edinburgh, with the parish pertaining to it."[14] Hence-

[10] Lawrie, "Annals," 62.
[11] "Early Scottish Charters," 46.
[12] *Ibid.*, 17. [13] *Ibid.*, 61. [14] *Ibid.*, 116.

forth it appears frequently in the charters of David's reign as a territory attached to a church, although its exact limits only gradually came to be defined.

Thus the division of the country into areas with a separate church, a priest to serve it, and an endowment in land for his maintenance, took its rise. The first parish church of which we have any record is supposed to be that of Ednam in the Merse. It was founded in the reign of Edgar by an English immigrant, Thor, who erected a church on lands granted him by the king, and endowed it with a ploughgate of land, or 104 Scots acres.[15] The term parish is not applied to these lands. But it is evident that the church was erected and endowed as a place of worship for the proprietor and the people on his estate, and thus the vill, the estate, or the barony became the parish, and the owner of the estate the lay patron of the living. This may be taken as an example of what took place all over the country in the early feudal period, the barony or manor becoming, by the liberality of the lord in founding and endowing a church, the parish—the unit of both the civil and the ecclesiastical organisation.[16] When the barony was a large one and was divided into several townships, these became in turn parishes. The growing burghs also developed into separate parishes.

The organisation of the country into parishes was an expedient admirably fitted to secure to the people the benefit of systematic religious ministration. Unfortunately, it was frustrated to a considerable extent by the practice of granting to monasteries the endowments of parish churches. Earl David, grandson of David I., for instance, granted ten parish churches to the Abbey of Lindores, and William the Lion gave to that of Arbroath no less than thirty-three. The endowments of a large number of parish churches thus came to be alienated to religious houses, which appointed vicars, poorly paid and ill trained, to the charge of them. This vicious practice proved to be very detrimental to the interests of the churches concerned, as the

[15] "Early Scottish Charters," 19.

[16] Parish has already become a conventional term in the reign of William. "Acts," i. 386 f.; *cf.* 96.

complaints of neglect and inefficiency during the period show.[17]

As in the case of the election of the Scottish kings, there is at least a formal recognition of the right of the clergy and people to elect the bishops in the early episcopal appointments. The first instances of the filling of an episcopal see are the appointment of Turgot and his successor to St Andrews in the reign of Alexander I. In both cases the record[18] implies some form of election. Practically, however, both appointments were made by the king, probably after consultation with his counsellors, lay and cleric. The election in such early instances was apparently little more than the survival of an archaic formula. In the inquisition into the See of Glasgow, David is said to have "elected" his former tutor, John, to the reconstituted See "by the consent of the clergy and the aid of his own" (councillors).[19] The election in this case was clearly the act of the king in co-operation with his cleric and lay advisers. After the establishment of the cathedral Chapters (the body of canons attached to the cathedral, whose head was the dean) the election passed to them in accordance with the prescription of canon law, and thus became more than a mere formula. During this period the right was on the whole duly recognised.[20] But as in England, the leave of the king to elect (*congé d'elire*) seems to have been an indispensable preliminary, and his assent as well as the confirmation of the pope was necessary to the validity of the election. The actual choice of the Chapter might be made in three ways—by taking a vote (*per scrutinium*) of those present after the discussion of the claims of possible candidates; by delegating the choice to a commission (*per viam compromissi*); or by acclamation (*per viam Spiritus Sancti*), when the consensus of opinion in favour of one candidate was obvious, and rendered either

[17] On this abuse in the thirteenth century, see "Statutes of the Scottish Church," 11-12.

[18] Anderson, "Scottish Annals," 130, 141.

[19] "Early Scottish Charters," 45.

[20] William the Lion, for instance, grants by charter the right to elect their abbot to the Canons of Scone. "Lib. de Scon," 22.

of the other two methods unnecessary. There are examples of the use of all three methods in the early period, though the second was the usual one. At the same time it is evident that the royal influence was often brought to bear on the decision of the Chapters, and that the right of assent reserved to the king gave him a real if indirect voice in the matter. The electors would, as a rule, only elect one that was likely to be acceptable to him, and it is evident that many of those elected were royal officials—the chancellor, or one of the king's clerks, or his chaplain, or even the chamberlain, who were only in minor orders, or did not even possess this limited qualification and had to receive ordination for the purpose. Moreover, the fact that the election was at times held at the king's residence, suggests the inference that the electors were liable to the royal direction in recording their votes.[21] That, however, they were sometimes disposed to assert their independence appears from the fact of occasional disputed elections, particularly in the reign of William the Lion. William vetoed the election of John the Scot by the Chapter of St Andrews in 1178, and commanded the consecration of Hugh, his chaplain.[22] He persisted in his arbitrary course in spite of excommunication and interdict by Pope Alexander III., who energetically intervened on behalf of the Chapter.[23] The dispute lasted for ten years, and was only terminated by the death of the king's nominee and the resignation of his rival, who accepted the See of Dunkeld instead. The way was thus cleared for the election of Roger, the chancellor, in 1189, after William had stubbornly defied three popes in succession.[24]

It was customary for the bishop, after election and before consecration, to do homage to the king as holding his temporalities from him. The oath of fealty was usually taken after consecration.[25] The separation of the two cere-

[21] See Dowden, "Mediæval Church," 45-46.

[22] Lawrie, "Annals," 224-225. [23] *Ibid.*, 228 f.

[24] *Ibid.*, 276-278. Another instance of a disputed election to St Andrews occurred in the reign of Alexander III., in which the king and the pope were in agreement against the electors. See Anderson, "Early Sources," ii. 574 f.

[25] "Regiam Majestatem," ii. 59.

monies was due to the feeling that it was unseemly for a consecrated bishop formally to acknowledge himself "the man" of a secular prince. The distinction, whilst nominally a concession to ecclesiastical susceptibility, recognised in substance the right of the crown to the feudal services inherent in the Church lands, except in the case of those specially excepted by the nature of the grant *in puram et liberam elemosinam*. As feudal superior, the king claimed the right to dispose of the temporalities of the See during an episcopal vacancy, as in the case of the land of a lay holder of the crown who was a minor. Moreover, he claimed the right, based on ancient custom, to confer all benefices during the same period in the gift of the bishop, and before the fourteenth century the right seems to have been unchallenged. Another claim, less justifiable, to the moveable property of a deceased bishop, aroused the opposition of both popes and bishops, though this also was based on ancient custom. It formed the subject of a long controversy which was started within our period and extended into the fifteenth century before it found a feasible accommodation.

In the reign of Alexander I. there was some friction over the question of the royal right of investiture. In the case of a lay baron the king exercised this right as a matter of course, investing the feoffee or the holder of a feudal office by the delivery of some symbol. In the case of a bishop or abbot who was also a feudal magnate, the king similarly assumed the right to invest him by delivering the episcopal ring and crosier. The practice was unchallenged on the Continent before the days of Gregory VII. To this masterful pope it seemed an unwarranted encroachment on the divine authority and function of the ecclesiastical order, and Gregory determined to vindicate what he deemed the indefeasible right of the spiritual power. Hence the investiture controversy in England and on the Continent which Gregory waged with the Emperor Henry IV. and Anselm with Henry I. of England. The quarrel between the English king and archbishop was settled by the king waiving the right of investiture, and by the archbishop agreeing that the bishops, on election, should do homage

for their temporalities. The controversy left a trace in Scottish history in the friction between Alexander I. and Eadmer, a monk of Canterbury whom he had appointed to the bishopric of St Andrews as successor to Turgot. Eadmer, it seems, consented to receive the ring, but not the pastoral staff which he took himself from the altar.[26] The result was dissension between them which ended in the retirement of the bishop. As in England, however, the practice of substituting homage for the reception of the ring and staff from the king seems to have prevailed.

The constitutional position of the Scottish Church was materially affected by the claim of the Archbishops of Canterbury and York to jurisdiction over the Scottish bishops.

The question of the claim of the English Church to superiority over that of Scotland in the twelfth century is connected with the question of the claim of the English king to the feudal overlordship of the Scottish kingdom. It was because of the latter claim that the Scottish kings of the twelfth century were so keen to disown the former, since the admission of the ecclesiastical superiority was fitted to strengthen the claim to political overlordship.

The English claim to the overlordship of Scotland was based on the purported but very debatable acknowledgment of this overlordship by the King of Scots to the English King Edward the elder, in the early part of the tenth century. At this time the Scottish kingdom comprised only the region north of the Forth and the Clyde, but during the eleventh century it was enlarged by the inclusion of Lothian and Strathclyde, the region lying to the south of these rivers. Lothian was gained by conquest, Strathclyde by transference to the Scottish crown on the death of the last of the Strathclyde kings. The English claim seems to have included the whole of the extended kingdom in the eleventh century, *i.e.*, Scotland north of the Forth as well as Lothian, which had indubitably formed part of England before its conquest by the Scots, and Strathclyde, which the English also claimed as part of their territory. This extended claim William the Conqueror took over from his

[26] Anderson, "Scottish Annals," 141 f.

predecessors, the English kings, and is said to have exacted from Malcolm III., the contemporary King of Scots, the recognition of it in 1072.[27]

The question of the English claim has been the subject of keen controversy between English and Scottish historians, between Mr Freeman, for instance, on the English, and Mr Robertson on the Scottish side. It is outside the scope of this chapter to enter into the merits of this debate. Let it suffice to say that the evidence is far from being explicit or free from ambiguity, and has lent itself to contradictory interpretations. It seems clear, at all events, that even the Anglic inhabitants of Lothian had no desire to have an alien Norman duke or his descendants as their overlord, and that the tendency was towards the union of both Celt and Angle north of the Tweed into an independent kingdom under their own sovereign lord. The important thing for us to note is the existence of this claim in the twelfth century, and the opposition to it by the Scottish kings of the period, as contributing to explain their refusal to admit the parallel claim of the Anglican Church over that of Scotland, made by both the Archbishops of Canterbury and York.

The claim of Canterbury was based on certain dicta of Popes Gregory the Great and Vitalian in the seventh century, according to which its archbishop wielded authority over all the bishops and churches of Britain.[28] These popes were evidently but imperfectly acquainted with the ecclesiastical situation prevailing in Britain at this period. The native British Church was naturally estranged from that of the Anglo-Saxon conqueror founded by Augustine, who was commissioned by Pope Gregory to evangelise the Anglo-Saxons towards the end of the sixth century, and

[27] The nature of the homage paid by Malcolm III. to William is by no means clear. It seems to have been rendered for lands held by him in England. In any case, his successors were not disposed to own the feudal supremacy of the English king over their kingdom. The homage professedly owned by his son Edgar at the end of the eleventh century occurs in a charter which is evidently spurious, and Edgar's brother and successor, Alexander I., was decidedly opposed to this claim. See Lawrie, "Early Scottish Charters," 14-17, and 250.

[28] Haddan and Stubbs, "Councils and Ecclesiastical Documents," iii. 22, 116.

was not disposed to recognise Augustine's jurisdiction.[29] Bede, who knew the situation better, speaks of Archbishop Theodore in the seventh century as exercising authority only over the churches of the Angles.[30] Later English chroniclers, however, writing long after this period, altered the phrase to the Church of "the whole of Britain."[31] The claim, as far as it concerned the native British Church, was therefore based on a misinterpretation of the actual ecclesiastical situation in Britain in the seventh century. It was equally devoid of foundation in relation to the Church founded in the fifth and sixth centuries by Ninian, Kentigern, and Columba among the Picts and Scots in the northern part of Britain, which afterwards became Scotland. It also was independent of the Anglo-Saxon Church, and though ultimately conforming to the Roman usages in the particular points in which it differed from the Anglo-Saxon Church in the seventh century, the *Ecclesia Scoticana* north of the Forth retained its independence under the Scottish dynasty of Kenneth MacAlpin from the middle of the ninth till the end of the eleventh century. During this period it was under the jurisdiction of the Bishop of St Andrews, usually known as Bishop of Alba, or Bishop of the Scots, and any claim to jurisdiction north of the Tweed on the part of the English bishops could only apply to Lothian as part of the English kingdom of Northumbria, and to Galloway which had been an Anglic See in the early Middle Ages.

With the conquest of Lothian by the Scots in the early eleventh century, this region became part of the Scottish kingdom, and the Anglic See of Galloway had ceased to exist.[32] Apart from Lothian, the English claim to ecclesiastical jurisdiction in Scotland did not really apply towards the end of this century.

The claim was, however, made in 1072 at the Council of Windsor, at which the controversy between Archbishop

[29] "Hist. Eccl.," ii. 2.

[30] *Ibid.*, iv. 2; Haddan and Stubbs, iii. 117.

[31] See, for instance, Eadmer, "Historia Novorum in Anglia," 282.

[32] The first authentic bishop of the revived See of Galloway or Candida Casa appears in the early twelfth century. See Haddan and Stubbs, ii. 24.

Lanfranc of Canterbury and Archbishop Thomas of York over their respective metropolitan jurisdiction was settled by agreement that York should have jurisdiction over all Scotland as well as the northern part of England.[33] Thus the claim of York to this jurisdiction came in to complicate that averred in behalf of Canterbury during the controversy with the Scottish kings and bishops on this subject in the twelfth century.

The statement that at the Council of Windsor Malcolm III. and his Queen Margaret, along with the Bishop of St Andrews, agreed that the primacy over the Scottish Church should be assigned to the Archbishop of York, rests only on the authority of a later English chronicler who, as Haddan and Stubbs point out, was a mere partisan of York.[34] No Scottish representative was present at this Council, and there is no reliable evidence that this assent was given. Alexander I., the son of Malcolm and Margaret, in fact, assumes, if he does not explicitly state, in a letter to Archbishop Ralph of Canterbury in 1115, that this assent was not given.[35] Queen Margaret, indeed, maintained close relations with Archbishop Lanfranc as her spiritual father, seeking his advice and assistance in the reformation of the Scottish Church. The archbishop sends her several monks for this purpose,[36] but there is nothing in these communications to show that he claimed, or that the queen and her husband, Malcolm III., admitted, an official jurisdiction over the Scottish Church. It is merely a case of co-operation in the queen's efforts to bring the usages of this Church into conformity with those of the Church Catholic.

At his accession in 1107 Alexander I. is also found in friendly communication with the Archbishop of Canterbury—in this case, the celebrated Anselm. He asks his prayers for his deceased brother Edgar, whom he had succeeded, and the archbishop grants his request and congratulates him on his accession.[37] In the year of his accession he appointed

[33] Wilkins, "Concilia," i. 324-325; Haddan and Stubbs, ii. 159.
[34] ii. 160.
[35] Eadmer, "Historia Novorum," 236.
[36] Lawrie, "Early Scottish Charters," 7-8.
[37] *Ibid.*, 20.

Turgot to the See of St Andrews, which had been vacant for fourteen years, since the death of the last Celtic bishop of the Scots in 1093, and applied, through the English King Henry I., to the Archbishop of York for consecration. But he appears to have resolutely resisted the imputation that such consecration implied recognition of the claim of York to ecclesiastical jurisdiction over St Andrews, and there was some delay on this account. "For," says Symeon of Durham, "the Church of York demands for itself, as by a certain right, the ordination and subjection of the primate of the Scots; but on the contrary the Church of St Andrews asserts that it owes nothing by any right of antiquity or custom." [38] Ultimately, as we learn from the same source, Turgot received consecration from the archbishop "without any demand for subjection, and saving the authority of either church," pending the further examination of the question.[39] His relations with the forceful Scottish king became so strained, however, that he retired to Wearmouth Abbey, where he died in 1115. King Alexander thereupon applied to Ralph, Archbishop of Canterbury, for his assistance in procuring a successor, at the same time protesting against the claim of the Archbishop of York based on the agreement at the Council of Windsor in 1072. The request remained unanswered for five years (the archbishop being abroad most of the time) till 1120, when the king wrote again, repeating his request and suggesting that he should send the monk Eadmer.[40] This time the archbishop complied, and suggested that after Eadmer's election he should send him back for consecration, on the understanding that the See of St Andrews was subject to Canterbury.[41] Eadmer speedily learned that the king was not only opposed to the claim of York, but that he was determined not to acknowledge any claim to jurisdiction in Scotland on the part of Canterbury. When Eadmer reminded him that "from of

[38] "Hist. Regum Anglorum," ii. 204; Haddan and Stubbs, ii. 170-171; Anderson, "Scottish Annals from English Chroniclers," 129-130; *cf.* Eadmer, "Historia Novorum," 198-200.

[39] *Ibid.*

[40] "Historia Novorum," 279-280.

[41] *Ibid.*, 281-282.

old the Church of Canterbury had authority over the whole of Britain," he was met with an emphatic contradiction. "The king," he tells us, "was greatly disturbed in his mind, and rising, departed from him. For he would not that the Church of Canterbury should be placed before the Church of St Andrew in Scotland." [42] On this point Alexander remained adamantine, repeatedly asserting that the kingdom of Scotland owed no subjection to the Church of Canterbury, and the relations between them became so strained that Eadmer was constrained to resign the bishopric and retire to Canterbury.[43]

The See again remained vacant for some years, though Eadmer offered to return and submit to the king's wishes, and his offer was supported by the archbishop, who tacitly waived the claim which had raised this storm.[44] Alexander would not be won over even by this concession, and in 1124, on the death of Eadmer, he found in the Prior of Scone a successor who shared his antagonism to the English claim.[45]

In his determination to maintain the ecclesiastical independence of his kingdom, Alexander would not yield even to the authority of the Pope, Calixtus II., who intervened on behalf of the claim of York. In 1119 this pope directed the Scottish bishops to recognise the metropolitan authority of Archbishop Thurstin, and condemned their "grave and perilous presumption" in consecrating one another without consulting their metropolitan.[46] Three years later (1122) he again wrote letters to the bishops and to the king, commanding them to obey. "Because of the presumption of the bishops of thy realm, and in the cause of our venerable brother Thurstin, Archbishop of York, we have already sent thee other letters; but in no point, in so far as we have learned, have we been obeyed by thee hitherto. Wherefore we exhort thy nobility in the Lord by the visitation of the present letters, and command that

[42] "Historia Novorum," 282-283.

[43] For details of the quarrel, see Eadmer's account of it in the "Historia Novorum," and Alexander's counter version in a letter to the archbishop.

[44] *Ibid.*, 299-302.

[45] Symeon of Durham, ii. 275; Anderson, "Scottish Annals," 155.

[46] Haddan and Stubbs, ii. 192.

thou by no means permit the bishops of thy realm to consecrate one another without permission of the metropolitan. But when the circumstances of the churches require, let the bishop-elect go reverently to thy metropolitan, to wit the Archbishop of York, and receive consecration either by his hand, or, if need compels, by his permission." [47] To this admonition Alexander paid no heed, and remained obdurate till his death in 1124.

Meanwhile Bishop John, whom Alexander's brother David, as Prince of Strathclyde, had appointed to the revived See of Glasgow, had been persistently maintaining the same attitude towards the Archbishop of York. John seems to have evaded the claim of York by obtaining consecration, probably in 1117, from Pope Paschal II., the predecessor of Calixtus, though the latter pope afterwards averred that the consecration had taken place with the consent of York. At all events, John is found refusing obedience to the archbishop as his metropolitan, as we learn from letters directed to him by Calixtus in 1119 and 1122,[48] commanding him to yield such obedience. He repeated his refusal at Rome itself, whither he had repaired to plead his cause in person against the suspension of the archbishop,[49] and continued in his defiance in spite of renewed efforts to bring about his submission.[50]

Thus at the end of the reign of Alexander I., both the Bishop of St Andrews and the Bishop of the revived See of Glasgow appear, with the support of the Scottish king, in persistent antagonism to the English metropolitan claim.

Under Alexander's successor, David I., they maintained their recalcitrant attitude. David was a devoted patron of the Church, founding and lavishly endowing bishoprics and abbeys, and bringing to full fruition the ecclesiastical policy of his mother, Queen Margaret. But, like his brother Alexander, he was resolute in maintaining the ecclesiastical independence of his kingdom. In 1128 he sought and

[47] Haddan and Stubbs, ii. 205; Anderson, "Scottish Annals," 148-149.

[48] Anderson, 148, 150.

[49] Haddan and Stubbs, ii. 21.

[50] Anderson, 150.

obtained the consecration of the bishop, whom his brother had appointed to the See of St Andrews, from the Archbishop of York, but with the express declaration, agreed to by both parties, that the consecration was "without profession of obedience," and that the rights of the Church of St Andrews as well as the claim of York should not be affected thereby.[51]

The controversy with the Bishop of Glasgow lasted much longer. Pope Honorius II., the successor of Calixtus, so far suspended judgment as to send a legate to Scotland to investigate the case in 1125. The legate met King David and the Scottish bishops in Council at Roxburgh,[52] and as the result of his report the pope ordered Bishop John to submit.[53] John refused to submit, however, and appeared at Rome once more, along with the Archbishops of Canterbury and York. He contended that Scotland was not part of the kingdom of England, and requested in behalf of King David that St Andrews should be erected into a Scottish archbishopric. The Archbishop of York, on the other hand, maintained that Scotland was part of the kingdom of England, and that the Scottish king was the vassal of the English king. Consequently, Glasgow was subject to York. Whereupon, the Archbishop of Canterbury disputed the conclusion, and claimed for his Church the primacy over the whole of Britain. The pope was puzzled by these contradictory statements, shaking his head and saying with a smile to one of the archbishops, "Brother, do be content to have enough." He arranged for a further hearing of the case, which does not, however, seem to have taken place.[54]

That the Bishop of Glasgow continued in his obduracy is evident from the letters of Pope Innocent II. to him and to the bishops of Scotland in 1131.[55] It is also evident from a letter of the same pope to the Archbishop of York, three years later, that he had the support of King David,[56] who was

[51] Haddan and Stubbs, ii. 214-216.
[52] Symeon of Durham, ii. 277-278; Haddan and Stubbs, ii. 211.
[53] Haddan and Stubbs, ii. 24; Anderson, 160.
[54] Haddan and Stubbs, ii. 23.
[55] *Ibid.*, ii. 25, 217; Anderson, 167-168.
[56] Haddan and Stubbs, ii. 28; Anderson, 169.

doubtless aggrieved by the failure of his plan for putting an end to the controversy by the erection of St Andrews into an archbishopric, which the pope, in view of the opposition of both Canterbury and York, had not entertained. He and the Scottish bishops, it would appear, went so far in their antagonism to the pope as to recognise the anti-pope of the time, Anacletus II.[57] Irritated by this defiance, Innocent at length, in 1136, directed both archbishops to anathematise the Bishop of Glasgow if he refused to acknowledge obedience to York within three months.[58] Still obdurate, the bishop retired for a time to the monastery of Tiron, in France. Two years later (1138) the pope, anxious apparently to win over the Scots, was fain to make trial of gentler methods, and sent a legate to negotiate with David and the Scottish bishops at Carlisle.[59] The king and the bishops unanimously decided to recognise Innocent as pope and, in return, the king and the legate agreed to send a royal messenger with letters, requesting John to return to his diocese. In the account of the transaction, which was palpably of the nature of an accommodation, no mention is made of any stipulation requiring his recognition of the claim of York, and no recognition seems to have been vouchsafed by him. He was simply recalled "by apostolic authority,"[60] and he remained in undisturbed possession of his See till his death in 1147. In the filling of the vacancy after his death the question of jurisdiction was evaded by the consecration of his successor, the Abbot of Kelso, by Pope Eugenius III.[61]

Evasion was not a satisfactory solution. York continued to assert his claim, and the controversy was reopened by the letter of Pope Adrian IV. in 1155, commanding the Scottish bishops to recognise his metropolitan rights, and threatening sentence against them in case of disobedience.[62] As an Englishman, the pope naturally favoured the English

[57] Anderson, 210-211.
[58] Haddan and Stubbs, ii. 29-30.
[59] *Ibid.*, ii. 31.
[60] Anderson, 211.
[61] Haddan and Stubbs, ii. 33; Anderson, 221.
[62] Haddan and Stubbs, ii. 231-232.

contention that Scotland was little more than a province of England.

A change of policy came at length with the accession of Pope Alexander III. in 1159, to whom Malcolm IV., David's successor, sent the Bishop of Moray in this year to renew the request that St Andrews should be made a metropolitan see.[63] The pope was unable, in deference apparently to English susceptibilities, to grant this privilege. But in 1161 he made the Bishop of St Andrews his legate in Scotland,[64] and three years later he consecrated Engelram Bishop of Glasgow, who had taxed the archbishop with his presumption in claiming jurisdiction over him at a meeting at Norham, and had the satisfaction of obtaining consecration from the pope in the presence of the procurators of York, "to the great confusion of the English and the manifest glory of the Scots," adds the patriotic chronicler.[65]

After the defeat and capture of William the Lion at Alnwick in 1174, the recognition of the overlordship of England which he was compelled to concede as the price of his liberty, seriously jeopardised the independence of the Scottish Church. The Scottish prelates present at the convention of Falaise undertook to recognise "the right which the Church of England ought justly to have over that of Scotland."[66] They repeated the undertaking at a meeting with Henry II. of England at York in the following year, and did homage to the English king.[67] The recognition might mean much or little, according to the interpretation put upon it, and at the Council of Northampton in 1176 they denied that the Scottish Church had ever been subject to that of England, and refused to own the metropolitan claim of York. Happily for them, the claim aroused the antagonism of Canterbury, and in the heated contention between the two archbishops the Scottish prelates took their departure without having tendered the submission demanded

[63] Haddan and Stubbs, ii. 233-234; Anderson, 240-241.

[64] Robertson, "Statuta Ecclesiæ Scoticanæ," i. 29-30.

[65] "Scotichronicon," viii. Chap. 15; Lawrie, "Annals of the Reigns of Malcolm and William," 76-77, 83-86.

[66] Lawrie, "Annals," 193.

[67] *Ibid.*, 201-202.

of them.[68] They appealed to the pope "to receive them into his own hand and protect them from the demand of the English Church." In reply, Alexander III. assured them of his sympathy, intimated that he had forbidden the Archbishop of York to exercise metropolitan jurisdiction until he had investigated the matter, and enjoined them "not to obey any metropolitan, but the Roman Pontiff."[69] Ultimately, as the result of two legatine inquiries in Scotland, he convinced himself that the English claim could not justly be maintained, and summoned the Scottish prelates to attend the Third Lateran Council in 1179.[70] Two representatives accordingly appeared at the Council, and their presence tacitly showed that the pope recognised the Scottish Church as an autonomous member of the Church Catholic.

Ten years later (1188) Clement III. definitely declared the Scottish Church to be subject only to the Apostolic See, of which it was "the special daughter," and disallowed subjection to any mediate authority. Henceforth no one except the pope or his legate *a latere* should pronounce a sentence of interdict or excommunication against the kingdom of Scotland, and such sentence, if promulgated by any other, was invalid. Nor could anyone hold the office of legate in Scotland who was not a subject of the kingdom or one specially deputed by the Apostolic See from the papal staff for this purpose. Nor, further, could any controversial matter arising in Scotland be tried and judged outside the kingdom unless appeal should be made to the Roman Church.[71] This Bull, which was later confirmed by Celestine III., Innocent III., and Honorius III., may be regarded as the *Magna Charta* of the liberty of the Scottish Church, though subsequent popes might show a disposition to countenance the claim of English kings to the feudal superiority of Scotland—a claim which reacted to some extent on the independence of the Church. It was completed by the bestowal of the right to hold Provincial Councils by Honorius III. in 1225. Hitherto Provincial Councils could

[68] Lawrie, "Annals," 206-207.

[69] *Ibid.*, 213-214.

[70] *Ibid.*, 223.

[71] Robertson, "Statuta Ecclesiæ Scoticanæ," i., Introduction, 39.

only be held in Scotland under the presidency of a papal legate, since the Scottish Church had no metropolitan. The result had been that Provincial Councils could not be regularly held, and the pope, having been made aware of the disadvantages to the government and discipline of the Church, now empowered the Scottish bishops to hold a Provincial Council by his authority.[72] The Bull was interpreted by the Scottish bishops as entitling them habitually to hold such Councils for the better government of the Church, and thus the Provincial Council became a distinctive feature of the Scottish ecclesiastical constitution. As finally evolved, it consisted not only of the bishops, abbots, and priors, but of deans, archdeacons, and representatives of collegiate churches and other clergy, together with certain doctors of theology and canon law, and doctors of civil law as the king's commissioners. One of the bishops was chosen by each Council as president, with the title of Conservator, who held office "from Council to Council," and whose duty it was to see that the decrees of the Council were duly observed and to punish offenders. It was also part of his duty to summon the Council, and though the office was practically that of a metropolitan, the title was evidently devoid of hierarchical significance. It seems, in fact, to have been deliberately chosen in order to ensure the equality of all the bishops, and obviate any pretensions to metropolitan rank on the part of any one of them. The president was to be no more than *primus inter pares*, and the office was to pass from one to another according as the choice of the members should decide.

The function of the Provincial Council was administrative rather than legislative. "Provincial Councils," remarks Dr Patrick, "might not define doctrines, nor were they expected to initiate new legislation: their design was rather to give collective weight to the same essential duties and functions as bishops were called on singly and in their diocesan councils to discharge. They expounded, applied, adapted, and saw to the observance of laws 'elsewhere defined'—especially at General Councils—demanded and secured relief

[72] For the Bull, see Patrick, "Statutes of the Scottish Church," 1.

from grievances, arbitrated in disputes, composed quarrels, and sought to bring the influence of the Church to bear on the people with more effect than bishops individually could do. They supervised the administration of the Church as a whole and of the dioceses severally; maintained discipline amongst the clergy generally, or so far as this duty was not overtaken by the bishops each in his own diocese; and in a higher degree than the bishops singly, had the control of ecclesiastical censures. Behind them they had the civil arm with its powers and sanctions, and from time to time invoked its aid." [73]

The Council seems to have met regularly in the thirteenth century, and to have attempted, not very effectively, as its surviving enactments show, to deal with those *enormia* (abuses) of which Pope Honorius had complained. A series of general statutes enacted in this century are concerned with such matters as the building of churches and chapels, the "farming" of churches by laymen or ecclesiastics, the alienation of their revenues, the protection of church lands from distraint by laymen, clerical concubinage and the use of the confessional for immoral purposes (spiritual incest), the abuse of indulgences or pardons, the payment of tithes, the excommunication of notorious offenders, especially those violating the rights of the Church.[74] These enactments are not original, but are largely borrowed from the legislation of General Councils and English Synods, adapted to Scottish conditions. Besides the Provincial Council, diocesan synods appear also to have been customary, and a series of statutes, enacted by the Synod of Aberdeen in the thirteenth century, has survived. A similar series stands in the name of David Bernham, Bishop of St Andrews, in this century.

A more effective medium of ecclesiastical administration was the bishop's court—the ecclesiastical, as distinguished from the feudal court of the bishop or other prelate (known also as "courts of Christianity"). The consistorial court dealt with all suits of what was deemed a more purely ecclesiastical character—matrimonial suits, questions of

[73] "Statutes," Introduction, 42. [74] *Ibid.*, 8 f., 46 f.

legitimacy, wills, dowry, slander, contracts on oath, disputes between ecclesiastics, offences against ecclesiastical discipline. In the diocese of St Andrews there were two consistorial courts, that of St Andrews proper having jurisdiction over Fife, Forfar, and the Mearns, and that of Lothian for the part of the diocese lying south of the Forth. The presiding judge in these courts was known as the Official, who was skilled in both canon and civil law, and acted as the bishop's deputy. Glasgow and the other dioceses had also their courts, though in the more remote of them they seem to have been only very gradually established. From them an appeal was permissible to that of St Andrews as the principal See of the kingdom. In addition to specifically spiritual causes, any case could be referred to the ecclesiastical court by consent of the parties. Since the churchmen or their notaries were by their special training in the canon law the most expert judges of the time, the tendency was to prefer the ecclesiastical to the secular courts in all available causes.[75] On the other hand, litigious ecclesiastics could only sue in the consistorial court, and were debarred from bringing the case before a forbidden court on pain of excommunication for persistent disobedience. The clergy could adduce this "benefit" and claim to be tried by the ecclesiastical judge even in the case of heinous crime, until the delinquent had been degraded by his ecclesiastical superior, when he was handed over to the secular court for punishment. In the case of crimes of less gravity, the delinquent was sentenced to be confined to the episcopal prison, and fed on bread and water.[76]

The far-reaching claims of the consistorial courts sometimes, however, led to friction with the secular courts. Laymen occasionally ventured to disobey the summons to appear before an ecclesiastical judge in disputes with ecclesiastics over the possession of lands or church patronage, and brought the case before the king's court[77]—a practice which was declared by Pope Innocent III. to be "against

[75] Innes, "Scotch Legal Antiquities," 238-239.

[76] "Statutes," 18-19.

[77] Lawrie, "Annals," 235; "Acts of Parliament," i. 390-392; "Nat. MSS.," i. 27.

the custom of the Scottish Church," and called forth at times the papal protest as well as the opposition of the clergy.

To the procedure of the ecclesiastical courts the development of law in Scotland owed much. In this respect the knowledge and expert skill of churchmen rendered an appreciable service to the State, though they seem to have been rather under the influence of class sentiment in their contentions in behalf of their order. Cosmo Innes traces trial by jury, for instance, as it developed in the early feudal period, to the procedure of the ecclesiastical courts. He finds in the record of a case tried in an ecclesiastical court in the early part of the reign of Alexander II. "the foreshadowing of the trial of an issue by a jury under a competent judge." This does not, however, appear in the record of the trial, which tells of witnesses sworn to give true evidence, not of jurymen sworn to give a just verdict on the evidence. The trial took place not in a diocesan court, but before a commission consisting of the deans of Carrick and Cunningham and the master of the schools of Ayr, nominated by the pope to hear the case. But it may be taken as an illustration of the procedure of the consistorial court of the period. The case arose out of a dispute regarding the lands of Monachkeneran on the Clyde, which the Abbey of Paisley claimed as the property of the church of Kilpatrick—a claim which was resisted by a layman named Gilbert. The abbot craved and obtained from the pope a commission which sat at Irvine in the year 1233 to hear evidence and decide accordingly. Before this commission the abbot brought witnesses to prove that the land in question belonged by right to the church of Kilpatrick and had been unjustly alienated. He demanded the ejectment of Gilbert and the restoration of the land. The witnesses were called, sworn, and interrogated, and on the ground of their evidence and "the advice of prudent men skilled in the law," the commissioners held that the abbot and convent had sufficiently proved their claim. They therefore adjudged them the land in question, condemned Gilbert, who evidently had failed to compear, in expenses, and enjoined the Bishop of Glasgow to execute their sentence and compel obedience by ecclesiastical censure in case of contumacy. Gilbert, it seems, refused to comply.

Whereupon the commissioners appealed to the king "to extend the secular arm" against him. With this appeal the king complied [78]—with what result is not stated—and, unfortunately for his posterior reputation, the accused, by refusing to appear, has left us without the means of judging what he had to say for himself. Probably he had no feasible defence.

Throughout this period the Church appears as a social factor of high importance as well as a religious organisation. However imperfectly, it strove to restrain the exercise of arbitrary, lawless force by moral and religious influence. Its claims and its privileges may seem arrogant and self-seeking, and doubtless the desire of power even for moral and religious ends may easily become a means of class oppression and selfishness in the hands of a richly endowed hierarchy. But it may also serve to bring justice to bear on social and political life, and the Church, as represented by the pope and the prelates, however questionable some of its claims and assumptions, did exercise this serviceable function in those rough centuries when law and justice were only too apt to be outraged by irresponsible violence.

Sources of Part II

Chapter I.—The Rise of Feudalism. Research on the subject of the rise of feudalism in Scotland in the twelfth and thirteenth centuries is hampered by the uncertainty of fixing the date of the Regiam Majestatem and the Quoniam Attachiamenta, and estimating the authority to be ascribed to them. These documents were regarded as forming part of the law of Scotland in the fifteenth century (see the Acts of 1425 and 1465, Acts, II. 10 and 97). It is generally agreed that the Regiam Majestatem is largely a compilation from the early English jurist Glanville (second half of twelfth century). It contains, however, some original matter, especially Book IV. Dr Neilson, the latest writer on the subject, inclines to the opinion that it may be taken as fairly

[78] "Acts of Parliament," i. 95-97.

representing the Scottish law of the thirteenth century. It is " an attempt to edit Glanville into accordance with the early thirteenth century law of Scotland " (Trial by Combat, 105). In view of the discordant views on the subject, the historian can only use it with some hesitation as a reliable source for this century. It is also questionable whether all the laws ascribed to David I. and William the Lion in the first volume of the Acts of the Parliament of Scotland were actually enacted by them. The Inventory of ancient documents made in 1292 and given in Vol. I. of the Acts and of the National MSS. of Scotland mentions lists of such documents belonging to the early feudal period. It is therefore evident that such were in existence. But it does not necessarily follow that all these printed in Vol. I. of the Acts were actually promulgated by the kings to whom they are ascribed. The record of them is not an official one, but was compiled by lawyers at a later time. There is, however, a reasonable presumption that they formed part of this ancient collection, though we cannot be certain of the exact authorship or date of their enactment. A new and critical edition of Vol. I. of the Acts of the Scottish Parliament is a desideratum. Another is a thoroughly critical history of the early law of Scotland. Acts of the Parliament of Scotland, I.; Early Scottish Charters, ed. by Sir A. C. Lawrie (1905); Fordun's Chronica and Gesta Annalia, ed. by Skene; National MSS. of Scotland, I.; Laing Charters, ed. by Rev. John Anderson (1899); Jacobus Anderson, Selectus Diplomatum Scotiæ Thesaurus, ed. by T. Ruddimann (1739); Liber Ecclesiæ de Scon; Chronica de Mailros; Liber Cartarum Prioratus Sancti Andree (these three are in the series of the Bannatyne Club); Registrum Episcopatus Glasguensis (Maitland Club); Lawrie, Annals of the Reigns of Malcolm IV. and William (1910); A. O. Anderson, Scottish Annals from English Chroniclers (1908), and Early Sources of Scottish History (1922); J. Skene, De Verborum Significatione (1599)—an explanation of old law terms; Sir Thomas Craig, Jus Feudale, 3rd edition (1732); Stuart, The Book of Deer; Walter Ross, Lectures on the Law of Scotland, 2nd edition (1822); Pollock and Maitland, History of English Law, I. (1895); Cosmo Innes, Scotch

Legal Antiquities (1872), and Early Scotch History (1861); Neilson, Trial by Combat (1890); Ferguson, The Barony in Scotland, *Juridical Review*, XXIV. (1912-13).

CHAPTER II.—The Early Feudal Kingship and the Rise of Parliament. Acts of the Parliament of Scotland, I.; Early Scottish Charters; Fordun, Chronica and Gesta Annalia; Scottish Annals from English Chroniclers; Early Sources of Scottish History; Annals of the Reigns of Malcolm IV. and William; Extracta ex Chronicis (Abbotsford Club); Chronicle of the Picts and Scots; Neilson and Paton, Acts of the Lords of Council in Civil Causes, II., Introduction (1918); Wyntoun, Original Chronicle, ed. for Scottish Text Society by F. J. Amours (1903 f.); Stevenson, Documents Illustrative of History of Scotland (1870); Baldwin, The King's Council in the Middle Ages (1913); Leadam and Baldwin, Select Cases Before the King's Council (Selden Society, 1918); Pollard, The Evolution of Parliament (1922); Maitland Thomson, The Public Records of Scotland (1922); Cosmo Innes, Scotland in the Middle Ages.

CHAPTER III.—Administration and Organisation. Acts of Parliament, I.; Early Scottish Charters; Scottish Annals from English Chroniclers; Early Sources of Scottish History; Annals of the Reigns of Malcolm IV. and William; Acts of the Lords of Council, II.; Bain, Calendar of Documents Referring to Scotland, I. and II. (1881 and 1884); Bateson, The Scottish King's Household, Miscellany of the Scottish History Society, II. (1904); Turgot, Vita Margaretæ, trans. by Forbes-Leith (1896); Liber de Scon; Chron. de Mailros; Registrum Episcopatus Glasguensis; Liber Cartarum Sancti Andree; Bower, Scotichronicon, ed. by Goodall (1759); National MSS. of Scotland, I.; Exchequer Rolls of Scotland, I., ed. by Stuart and Burnett (1878); Neilson, Trial by Combat; Maitland Thomson, Public Records of Scotland; Cochran-Patrick, Mediæval Scotland (1892); Cosmo Innes, Sketches of Early Scotch History (1861); Scotch Legal Antiquities; Malcolm, The Office of Sheriff in Scotland, *Scottish Hist. Rev.* (1923); Hamilton-Grierson, The Suitors of the Sheriff Court, *Scottish Hist. Rev.* (October 1916).

CHAPTER IV.—The Rise of the Burghs. Acts of Parliament, I.; Early Scottish Charters; Bede, Historia Ecclesiastica; Cosmo Innes, Ancient Laws and Customs of the Burghs of Scotland (1868); Exchequer Rolls of Scotland, I.; Registrum Episcopatus Glasguensis; Register of St Andrews; Vita Kentigerni, ed. by Forbes (1874); National MSS. of Scotland, I.; MacKinnon, History of Modern Liberty, I. (1906); Vinogradoff, Growth of the Manor (1905); Pollock and Maitland, History of English Law, I.; Neilson, Trial by Combat; Cochran-Patrick, Mediæval Scotland; Maitland Thomson, Public Records of Scotland; Bateson, Borough Customs (Selden Society, 1904-06); Early Scottish Burghs, *The Scottish Historical Review* (1883).

CHAPTER V.—The Early Mediæval Church and Its Constitution. Acts of Parliament, I.; Early Scottish Charters; Annals of Malcolm IV. and William; Scottish Annals from English Chroniclers; Robertson, Ecclesiæ Scoticanæ Statuta (1866); Patrick, Statutes of the Scottish Church (Scottish History Society, 1907); Haddan and Stubbs, Councils and Ecclesiastical Documents, II. and III. (1871-73); Wilkin's Concilia Magnæ Britanniæ, I. (1731); Bede, Historia Ecclesiastica; Eadmer, Historia Novorum in Anglia, Rolls Series, ed. by Rule (1884); Bower, Scotichronicon; Dowden, Mediæval Church in Scotland (1910); MacEwen, History of the Church in Scotland, I. (1913); Skene, Celtic Scotland, II. (1887); Cosmo Innes, Scotch Legal Antiquities; Sir A. H. Dunbar, Bart., Scottish Kings (1899); Black, The Civil and Ecclesiastical Parish in Scotland (1911).

PART III

FROM THE WAR OF INDEPENDENCE TO THE REFORMATION

CHAPTER I

THE KINGSHIP AND ITS EXERCISE—FROM ROBERT I. TO JAMES III.

As the result of the War of Independence Robert Bruce succeeded in vindicating the claim of Scotland to be a sovereign State and in re-establishing the Scottish monarchy as the supreme embodiment of this sovereignty. It was ultimately recognised by the English king in the Treaty of Northampton in 1328, the year before the heroic King Robert's death. It was also formally acknowledged by the Pope John XXII., who had taken the English side in the quarrel.[1]

The kingship thus vindicated and re-established was of the feudal type which had gradually developed under the Anglo-Celtic dynasty of Malcolm Canmore. The king is the head of a feudally organised State—its supreme superior from whom all landowners hold immediately or mediately, and to whom they owe fealty and service. But though the king is the supreme superior, he is not the absolute ruler of the kingdom. The feudal kingdom forms a "community" (*communitas*) which in the general sense includes all free-holders, and in government and legislation the community is assumed to be an integral factor. In the early feudal period the term might have a somewhat conventional sense. It was practically equivalent to the magnates in Church and

[1] "Nat. MSS.," ii. 20 f.

State by whose advice and consent the king rules. In the early part of the fourteenth century, as the result of the struggle for independence, the community assumes the more definite form of the Three Estates—clergy, barons, burgesses. In accordance with the tendency in operation elsewhere—in England, France, and Spain—the Constitution in its feudal form takes the definite shape which it was to preserve during the next four centuries.

The theory underlying this Constitution—in so far as there is a theory—is that the king derives his right to rule from the people. It is not merely a doctrine of the schools elaborated in the course of the long struggle between the mediæval popes and the mediæval emperors. It finds expression in important State documents of the reign of Robert I. In a Declaration of the Scottish clergy, assembled in Council at Dundee in 1309 in support of Robert Bruce, the people are said to have chosen Bruce to be king on the ground of his right of blood and his ability to defend the kingdom against its oppressors, and restore it from the desolation and slavery to which it has been exposed at the hands of the King of England. With their concurrence and consent he has been chosen king, and set over the kingdom. The Declaration is not, indeed, an expression of the national will, inasmuch as it expresses only the mind of the clergy. The barons are significantly ignored. But in claiming to speak in the name of the people, and especially of "the Commons," they were giving expression to what was substantially true. It was the community of Scotland—the lesser free-holders and their followers—supported by the clergy, that had rallied round William Wallace in defence of the independence of Scotland against Edward I. It was again the commons and the clergy that rallied round Bruce in the renewed struggle against Edward's son and successor. The Anglo-Norman nobility of Scotland were not distinguished by their fidelity to Scottish independence in the earlier period of the struggle at least. Some of them held lands in England, and were in so far subjects of the English king. But whether or not they owed allegiance to the English king for English lands, they were by descent or self-interest amenable to English influence. During the years supervening on Wallace's defeat, when

Edward held Scotland in his thrall, there was the excuse of yielding to *force majeure*. Bruce himself during these years had been a rather opportunist patriot. But he was no adventurer of the common type, and the heroism and resource with which he carried on the struggle for independence ultimately won him the adhesion of a growing section of the Scottish magnates, with his nephew Randolph and Lord James Douglas at their head.

Thus it came to pass that in 1318 the voice of the barons of Scotland made itself heard with equal emphasis in the famous letter to the pope indited from Arbroath Abbey. In this document the barons profess the same constitutional doctrine as the clergy in 1309. Robert Bruce is King of Scotland by right of succession, his own merits, and "the assent and consent of all of us." His government they will maintain to the death. If, however, he were to desist from his enterprise and seek to subject the kingdom to the English, they would immediately expel him as a subverter of his own rights and theirs, and make another their king who should be able to defend them.[2]

The theory of the limited monarchy in its mediæval form, by which the king derives his authority from the community and rules with its concurrence and consent, seems also to underlie the regulation of the succession in 1318. In this document the prelates, barons, and others of the community of the kingdom, in the exercise of their right to decide such questions, enact the succession to the crown, which on the death of the king without a male heir is to pass to the son of his daughter Marjory and Walter the Steward. For the future they adopt the hereditary principle that the nearest heir, male or female, in the direct line, or failing such, the nearest heir in the collateral line, is to succeed without contradiction or impediment.[3] They thus explicitly ignore the old theory of election, and seem to waive the right exercised in the case of the reigning king. But the explicit recognition of the hereditary principle was based on the express will of the Estates, not on any inherent right of the individual successor, apart from this constitutional

[2] "Nat. MSS.," ii. 17. [3] "Acts of Parliament," i. 465-466.

enactment. Moreover, in the actual work of government the constitutional rights of the Estates are, as we have noted, clearly reflected in the agreement or "indenture" entered into by the king and the Parliament at Cambuskenneth in 1326.

The kingship re-established by Bruce in the beginning of the fourteenth century was thus a limited monarchy, based on the will of the feudal community and conditioned in its exercise by the concurrence and consent of the community. This was the theory that obtained throughout the next four centuries and, though it was often only latent and the strong king recognised it in form rather than in substance, it found expression on occasion in the claims and enactments of the Estates. It also runs through the histories of Major, Boece, Knox, and Buchanan. Major, who was a liberal-minded historian as well as a noted scholastic theologian, is fond of repeating the political commonplaces of the schools on the sovereign right of the people to choose and, in case of proved incapacity or tyranny, to depose the king.[4] He holds the kingship in high esteem, and extols the merits of good kings like Robert I. and James I. At the same time he is the staunch champion of mediæval constitutionalism—the co-operation and, in affairs of special importance, the decisive influence in government of the Estates. "It pertains to the Three Estates in any matter of extreme difficulty to deal authoritatively with doubtful matters affecting the kingdom." [5] "It belongs not to the king nor to the Privy Council to declare the emergence of any sudden necessity (the levying of taxes, for instance), but only to the Three Estates." [6] More particularly the nobility, as the representatives of the common people, whom he rather distrusts and depreciates on occasion as "the unbridled populace," is entitled to take the lead in securing and maintaining the commonweal,[7] though he does not hesitate to condemn their ever-recurring turbulence and their misuse of their power in the service of their ambition.

Whilst this is the conventional political teaching of the schools, Major finds it reflected in the Constitution of Scot-

[4] See, for instance, "Greater Britain," 213 f.
[5] *Ibid.*, 243. [6] *Ibid.*, 352. [7] *Ibid.*, 215.

land, and loses no opportunity of illustrating it from Scottish history. His interpretation of the Constitution passed from him to his pupils, Knox and Buchanan, who profess the same constitutional doctrine. Whether it corresponded to actual institutions and practice is a different question. The fact is that from the time of Robert I. the power of the kingship depended largely on the personality of the king. Under the strong-willed James I., James II., James IV., and James V. the crown was the main force in government. Under rulers of far less resource and resolution—David II., the Second and Third Roberts, and James III.—the government was largely in the hands of the magnates in Church and State. But whether the strong king held sway or the feudal magnates were supreme, the Estates were little more than the tool of the dominant power in the State for the time being. James I., for instance, made use of them to enforce his imperious will against recalcitrant nobles. Similarly the magnates who ruled when the king merely reigned had recourse to the subservient co-operation of Parliament. In both cases the constitutional monarchy was more a form than a reality—a result for which, as we shall see, the arrested development of the Scottish Parliament during this period was largely responsible. At the same time the recourse to the sanction and co-operation of the Estates had at least a potential value in preserving the tradition of constitutional liberty from extinction at the hands either of the strong ruler or the baronial oligarchy. The tradition persisted till the time when the Third Estate, as the more active representative of the people, became a power in both legislation and government as the result of the Reformation.

A formidable cause of the weakness of the kingship during this period is traceable to the mistaken policy of Bruce at the commencement of it in unduly augmenting both the possessions and the power of his supporters among the Scottish nobility. After Bannockburn he decreed in a Parliament at Cambuskenneth in November 1314 the forfeiture of the lands of those who had taken the wrong side in the struggle.[8] This might seem a just retribution on those who, in abetting an alien sovereign, might well appear in the light

[8] "Acts," i. 464.

of traitors to their country as well as his personal enemies. But allegiance in those days of rival claimants to the crown was a variable virtue, and the record of even those, including Randolph himself, who had ultimately thrown in their lot with the victor of Bannockburn, had not been very consistent. Moreover, the victor himself in the earlier stage of his career had played a somewhat dubious part from the exclusively patriotic point of view, and it would have been a wiser policy to conciliate the opposition, instead of embittering it by wholesale confiscation. There is, indeed, the excuse that confiscation was necessary in order to pay for the war. It was a handy financial expedient in a country impoverished by twenty years of invasion and war. All the same, the policy of confiscation was unwise, inasmuch as it afforded in the following reign a fair pretext for the intrigues of embittered malcontents against the independence of Scotland, and gave an opportunity for renewed English invasion and war. Equally questionable, from the point of view of the national interest and the future stability of government, was the policy of enriching his friends out of these confiscated lands. Still more questionable, with these great estates was combined the grant of regality which transferred to their new owners almost regal powers. Randolph, for instance, who was made Earl of Moray, with vast possessions from the Spey to the western ocean, became a sort of sub-king, with a jurisdiction little different from that of the crown itself. The grant of the vast territory defined in the charter was made "in free earldom and free regality," including the four pleas of the crown and all suits and pleas pertaining to a free regality, with the great custom and cocket of Inverness, with full power of arresting, accusing, and judging the inhabitants of the region accused of crime, as the king and his officials were entitled to do. In addition to Inverness, the grant included the royal burghs of Elgin, Forres, and Nairn, and all burghs, vills, thanages, manors, rents, etc., formerly belonging to the crown, the advowsons (patronage) of churches, forfeitures, etc.[9] The result was, in fact, to

[9] "Registrum Magni Sigilli," i. 444-446; Robertson, "Index of Charters," 49-51.

make such highly favoured magnates the local rivals of the king and eventually to perpetuate, in another form, the periodic revolts on dynastic grounds of the early feudal period in the rebellions of the factious, turbulent descendants of the great lords on whom Bruce's ill-considered, if perhaps excusable generosity conferred almost regal power. "A grant of regality," says Mr Cosmo Innes, "took as much out of the crown as the sovereign could give. It was, in fact, investing the grantee in the sovereignty of the territory, and it raised up those formidable jurisdictions which too often set the crown at defiance." [10] In addition to all the rights of a barony, it conferred jurisdiction over the inhabitants equal in civil matters to that of the sheriff, and in criminal matters, with the exception of treason, to that of the justiciar.[11]

In Scotland, as in England and France in the fourteenth and fifteenth centuries, the feudal magnate was the chief obstacle to the consolidation of the State under the national king. The policy of delegating to the feudal baron powers which, in the modern State, are restricted to the national administration, might in the early period be a serviceable method of ensuring law and order at a time when the central authority was but imperfectly developed. But in its extreme form of the regality it placed a dangerous power in the hands of the higher nobility who could command the services of a large number of vassals and retainers. In England the Wars of the Roses undermined the power of the great feudal nobility, and resulted in the establishment of the strong monarchy and the national State. In France the Hundred Years' War achieved the same result. In Scotland, where no such forces were at work, the efforts of the stronger kings were only temporarily successful, and the periodic baronial anarchy perpetuated itself into the sixteenth century.

The national conditions during this period were only too favourable to the misuse of power by the magnates at the expense both of the crown and the commonweal. From

[10] "Scottish Legal Antiquities," 40.

[11] Green, "Encyclopedia of the Law of Scotland," art. "Regality." Some of the bishoprics—St Andrews, Moray, and Glasgow—were made regalities in the fifteenth century. Dowden, "Mediæval Church of Scotland," 287.

the reign of Robert I. to that of Queen Mary no less than six of the successors to the throne (including the years of the captivity of James I.) were minors, and during these minorities the scramble for the government gave ample scope for baronial lawlessness. Moreover, the feud with England which the War of Independence started, but by no means ended, perpetuated the vicious tendency on the part of feudal malcontents to enter into treasonable relations with the English king for selfish ends. Celtic unrest in the Highlands told in the same direction, the Lords of the Isles persistently pursuing the policy of intrigue with the English enemy against a king to whom they owed an unwilling allegiance. The ever-recurring feud itself, apart from these dangerous concomitants, exposed the land to frequent invasion and counter-invasion. When the regular campaigns ceased, the raid remained as a sort of permanent institution. It was regarded on both sides as a fair means of livelihood by the wild barons of the Marches, and this inveterate proclivity to spoil the enemy kept the two countries in a perpetual seethe of reprisals. The same spectacle of mutual harrying by Celt and Saxon presents itself on the Highland line, the Highland riever in particular considering the lands of his Lowland neighbour as his fair sphere of exploitation, on the assumption that these lands had once been the possession of the Celtic race which the Saxon had despoiled of its birthright. With these two extremes of the kingdom in perpetual embroilment, it taxed all the resource of the strongest of the Stewart kings to enforce their authority in these wild regions, whilst the weaker ones had to be content with the mere semblance of government. Again, the Franco-Scottish alliance which involved Scotland in the standing feud between England and France was a fateful heritage for the Scottish crown. It may be said, indeed, to have enhanced the prestige of the Scottish king and the political importance of Scotland as a factor in international politics. It served, too, on occasion as a check on the English policy of subjugating Scotland to the English crown. But in the reigns of David II., James IV., and James V. it not only led to national disaster: it gave an impulse to the factious strife within the kingdom which such disasters quickened for

the time being into renewed activity, and ultimately, in Queen Mary's reign, led to that experiment of Frenchified rule which culminated in civil war and in the deposition of its misguided protagonist.

It was unfortunate for the kingship that the first three successors of Robert I.—David II. and the two Stewart kings, Robert II. and Robert III.—were entirely incompetent to fill his place. Bruce's son, David, was bellicose and brave to rashness. His French education had made him an accomplished knight, and had inspired him with a good conceit of his military capacity. But he had not inherited his father's military genius, as the disaster of Neville's Cross showed, or his strength of character and his skill in the art of government, and, but for the patriotic spirit of the people, he would have tamely bartered the independence of his country as the price of his release from English captivity and the cancelling of his ransom.[12] Though a section of the nobles was prepared for their personal advantage to comply and sell their country to the English king, the spirit of Bruce still lived in the large majority of his countrymen, if not in his degenerate son, and staunchly resisted this and every other attempt to undo or compromise his work. Oppressive taxation and impatience of the prevailing misgovernment of the king and his ministers culminated in the revolt of the Steward and the Earls of March and Douglas in 1363.[13] David might succeed in crushing the revolt, but his disastrous and disgraceful rule had fatally reduced the crown from the strong position in which his father had placed it in the esteem of his subjects. "The son of Robert Bruce," concludes Mr Lang severely, but not unjustifiably, "contrived to involve his country in every conceivable kind of trouble and disgrace." [14]

Under his successors, the first two Stewarts, the eclipse of the kingship was intensified. Both were men of amiable temperament, and neither was capable of the perfidy of David. But Robert II. was a worn-out valetudinarian by

[12] MacKinnon, "History of Edward III.," 403-404; *cf.* 512 f.
[13] Fordun, "Gesta Annalia," i. 381-382.
[14] "History of Scotland," i. 266.

the time he reached the throne, and had little inclination for fighting or governing. He left both largely in the hands of his younger sons, the Earl of Fife and later Duke of Albany, and the "Wolf of Badenoch," who played the ruffian pure and simple throughout the north, and to the Earls of Douglas and March. In 1389, the year preceding his death, the Estates found it necessary, in view of the infirmity of his mind and body, formally to confer the government on the Earl of Fife as Regent of the kingdom.[15] "He was," says Major, "neither a skilful warrior nor wise in counsel."[16] The same might be said of his eldest son, who succeeded him as Robert III. Like his father, he was past his prime at his accession, and the lameness and bodily infirmity from which he had suffered from his youth, as well as his retiring disposition, unfitted him for the active work of government. His tall figure, his flowing white beard, his fine features and benevolent expression, his love of justice and his efforts to protect the people from the rapacity of the royal officials, made him a popular favourite.[17] "This Robert," says Major, "wrought no hurt to his subjects."[18] But he was otherwise so incompetent that the Estates deemed it advisable to continue the Earl of Fife in his office as Governor (*Gubernator*) of the kingdom. In the middle of his reign they substituted for the earl, now Duke of Albany, the king's dissolute but energetic eldest son, David, Duke of Rothesay. The rivalry of uncle and nephew was the result, and this party strife was aggravated by the treason of the Earl of March who, in revenge for Rothesay's faithless treatment of his daughter, to whom he was betrothed, transferred his allegiance to Henry IV. of England and abetted the enemy of his country in the hostilities which ensued. The death of Rothesay in 1402, which was attributed to foul play at the hands of Albany, and the capture of his second son, James, by the English while on a voyage to France in 1406, broke their luckless father's heart. He is the most tragic of these Scottish *rois fainéants* of the fourteenth century.

[15] "Acts of Parliament," i. 553-554.
[16] "Greater Britain," 329.
[17] "Scotichronicon," ii. 419 and 448.
[18] "Greater Britain," 337.

"A good man was this third Robert," notes Major, "but in no way a good king." "A decrepit and impotent king" is the judgment of Bower,[19] who notes another sinister feature of his tragic rule. "There was great abundance of victuals in this reign, but the greatest discord, strife, and intrigue among the magnates and nobles, because the king, so weak in body and so timid in disposition, never exercised rigour in dealing with them." [20] "There was no law in Scotland," according to the Register of the Diocese of Moray, "but the great man oppressed the poor man, and the whole kingdom was one den of thieves; slaughters, robberies, fire-raisings, and other crimes passed unpunished, and outlawed justice was banished from the realm." [21] Whatever the feeling of the common people towards him, the Estates in 1398 treated him with scant courtesy, in addressing him on "the misgovernance of the realm." They unceremoniously impute this misgovernance and the non-observance of the common law to the king and his ministers, and curtly tell him that "if he cares to excuse his defaults he may, at his own liking, cause his officers to be summoned and accuse them in the presence of his Council." [22] The contempt for the crown which these words indicate had thus become dangerously widespread among the higher classes as the result of these disastrous reigns, extending over an interval of seventy-five years.

From this long eclipse the crown emerged in the next two reigns. Both James I. and his son James II. were effective rulers. After the long interregnum of eighteen years, during which the Duke of Albany and afterwards his son, Duke Murdoch, acted as guardians of the realm, James I. at length, in 1424, returned from his English captivity. In spite of his advanced age, Albany had ruled with considerable skill. The chronicler praises the patience and prudence with which he had managed the magnates and had effectively countered the rising of Donald of the Isles by the victory of Harlaw. But he had only maintained the upperhand of

[19] "Scotichronicon," ii. 431.
[20] *Ibid.*, 448.
[21] "Reg. Episc. Moraviæ," 382; *cf.* "Acts of Parliament," i. 570 f.
[22] "Acts," i. 572.

the unruly barons by overlooking their "enormities,"[23] and under the "remiss" régime of his son, Duke Murdoch, who succeeded him as Regent in 1420, the baronial anarchy, of which the regent's vicious sons afforded the worst examples, had been allowed a free hand.[24] There was ample need for the application of the strong hand in government, and with the actual accession of James I. in 1424, the strong will made itself felt in no uncertain fashion.

James was determined to be master in his kingdom. When, on entering Scotland, he heard of the rapine and disorder under the impotent regent, he is said to have exclaimed, "If God shall give me life, with His help I will make the key keep the castle and the bracken bush the cow throughout the whole kingdom."[25] To this end he made use of the co-operation of the Three Estates in the prosecution of his policy of enforcing law and order. But the dominant factor in the repressive enactments passed by them against the prevailing anarchy was undoubtedly the master will of the king himself. These acts received at the outset of his reign a drastic application in the trial and execution of Duke Murdoch, his two sons, and his father-in-law, the Earl of Lennox. Another son, who had burned Dumbarton and slaughtered its garrison, was outlawed and driven out of the kingdom, and those of his fellow-desperadoes who were caught, dragged at the tails of horses and hanged.[26] Other dangerous characters were promptly placed under ward, including the Lord of the Isles, the son of the rebel who had been crushed at Harlaw; and a large number of the Highland chiefs, whom he had summoned to meet him at a Parliament at Inverness, were summarily imprisoned in the castle. The Lord of the Isles was subsequently released, but a number of the others were only brought forth to mount the scaffold. The rest were transferred to various strongholds throughout the kingdom, and subsequently tried and "justified" or set free as justice decided.[27] The Lord of the Isles who, in revenge for his drastic treatment, afterwards

[23] "Scotichronicon," ii. 466. Per potentes enormia commissa patienter ad tempus dissimulavit.

[24] *Ibid.*, 447.

[25] *Ibid.*, 511.

[26] *Ibid.*, 482-484.

[27] *Ibid.*, 488-489.

revolted, was defeated by the king in person in Lochaber, and was fain ultimately to appear at Holyrood in his shirt, and on his knees place his sword in the king's hands and beg for mercy. James, at the entreaty of the queen and the nobles present, spared his life and sent him to Tantallon Castle, and this experience of the king's might and mercy taught him the expediency of preserving his allegiance to such a forceful ruler.[28] Another of these "wild Scots," Donald Balloch, after defeating a royal force, had to seek refuge in Ireland. The Earl of Douglas was arrested and warded temporarily for some unknown reason, probably in pursuance of this policy of intimidation. This policy was certainly successful for the time being, for, according to Major, "in James's time there was no noble who dared to raise his sword against another; to his orders, written or spoken, every man alike yielded obedience. . . . In such wise did he administer justice among his people that when once the king was named, they yielded an absolute obedience." [29]

In addition to this repressive action against the magnates, he sought to strengthen the crown by attaching to it their confiscated lands. He applied this policy in the case even of the Earl of March, who was a law-abiding subject, but whom he imprisoned and disinherited on account of the sins of his father,[30] in spite of the fact that his father's forfeiture had been revoked by the Duke of Albany.

The Estates at his behest countered this plea, which the earl adduced, with the contention that this revocation was null and void.[31] Equally questionable was the appropriation of the earldom of Strathearn, on the death of the earl, in despite of the legitimate right of his daughter and her son to its possession. In similar fashion the claim of the lawful heir to that of Mar, on the death of the victor of Harlaw, was overridden in his favour.[32] More legitimate was the scrutiny, ordained by the Estates at his instigation, of the charters of the tenants in chief, who were ordered to produce

[28] "Scotichronicon," ii. 489-490; *cf.* Major, "Greater Britain," 350 f.
[29] "Greater Britain," 367.
[30] *Ibid.*, 362.
[31] "Acts," ii. 23; "Scotichronicon," ii. 500.
[32] "Chron. Jacobi Primi," 15.

them at the king's summons.[33] He refrained from laying hands on the lands of the Church, though he regretted the lavish gifts of some of his predecessors, especially of David I., that "sair sanct for the crown," as he called him.[34]

Legislation for the execution of justice and the maintenance of order kept pace with these drastic measures. Law after law was promulgated against law-breakers high and low, against "notour rebels," against private war, against "leagues and bands" among the king's fractious lieges, against the slackness of the royal officers in the administration of justice. In view of this legislation, which an industrious Parliament mechanically enacted, and the solicitous interest in the protection of the common people, James merits the reputation as a forceful administrator of justice, which the chroniclers signalise as the salient feature of his reign. "He established a firm peace in the kingdom," says Bower; "he suffered neither the magnates nor the lesser nobility to quarrel among themselves, as was their wont, and checked any rising discord. If anyone resisted he paid the penalty for his rashness forthwith. He protected the people from plunderers."[35] Major compares him to Randolph, and esteems him his superior in the administration of justice, "for Thomas found the country in a more peaceful state than did James."[36] At the same time there was an arbitrary strain in him, which Bower and Major[37] ignore and which he transmitted to his posterity. To the magnates whom he terrorised his administration seemed a sheer tyranny, and the author of another chronicle of the period, who voices their point of view, agrees with them. He says that the king sent Duke Murdoch and his sons to the block for the murder by Albany of his brother, the Duke of Rothesay, and that the people "sore grudged and mourned" their fate. He adds that they attributed his ruthless actions to his avarice and his desire to get hold of their estates, and the heavy taxes which he imposed to pay his ransom to a similar sordid

[33] "Acts," ii. 4.
[34] "Greater Britain," 353.
[35] *Ibid.*, 509-510.
[36] *Ibid.*, 367.
[37] Major does raise the question whether James was not addicted to arbitrary methods, but he leaves it undecided owing to lack of knowledge of the true facts of the case. "Greater Britain," 361.

motive. He further tells of an aristocratic conspiracy to arrest him in full Parliament and put him to death as a tyrant, and of an unsuccessful attempt by Sir Robert Graham to carry it out in one of his Parliaments.[38]

This chronicler undoubtedly reflects the prevailing baronial view of James's repressive policy, though Major assures us that many of the nobility were sincerely attached to the king.[39] We are apt, perhaps, to exaggerate the baronial opposition to the crown, as if the feud between king and magnates, so characteristic of this period, involved the whole of the feudal nobility. The magnates had always a following among the lesser nobles who were their vassals. But there was a section of the immediate vassals of the crown—the lesser barons—who were not necessarily involved in the periodic baronial opposition, and also seem to have been good subjects of the king, though it must have been difficult at times to avoid taking sides. In the case of James I. there seems, however, to have been a good deal of latent aristocratic ill will under his drastic rule, which at last, in 1437, sought a desperate remedy in his ruffianly murder at the hands of Graham and his band of "wild Scots" in the Carthusian monastery at Perth. The excuse of baronial lawlessness in palliation of his drastic measures may, indeed, be carried too far. The seizure of the Highland chiefs, who were tricked into captivity at Inverness, was, for instance, a distinct breach of faith. His deprivation of March and other magnates of their estates seems to have been due to avarice, even if it might be serviceable in augmenting the power of the crown. James was not the paragon of pure justice and undiluted devotion to the commonweal that his panegyrists depict. He was arbitrary, precipitate, and over-confident in his ability to dragoon the country into submission, and some of his methods remind us of those of his contemporary, Louis XI. of France, to whom, as dauphin, he married his daughter, Margaret, to her subsequent sorrow. Though he legislated and administered with the co-operation of the Estates, he was the protagonist of personal and arbitrary

[38] "Death of the King of Scots," 49-51.
[39] "Greater Britain," 367.

rule rather than of constitutional monarchy. But he certainly succeeded in making the authority of the government felt over the length and breadth of the land, and rebellious Lowland barons and unruly, quarrelsome Highland chiefs needed to learn the rough lesson he taught them.

There can be no doubt that a number of those whom he thus ruthlessly taught to respect the royal power were dangerous criminals, whose only law was their own wills, ever ready to enter into treasonable leagues or bands, prone to wage war with one another, prone also to take and give offence and avenge what they deemed a wrong, with little or no concern for the commonweal when it conflicted with their personal advantage. Major repeatedly refers to this feature of the history of feudal Scotland, though he shows a great respect for aristocracy and is anti-democratic in the larger sense of this term. In this respect Scotland was no better and no worse than other nations in which a privileged, feudal aristocratic caste dominated or sought to dominate the State. Under such domination the national State was an impossibility. The nobles, says Major, considered it their interest to keep the king weak in order to maintain this domination.[40] For this reason, he thinks, they always opposed a feasible union with England, based on mutual agreement, since such a union would mean the augmentation of the royal power at their expense.[41] Their turbulence was inveterate. "If two nobles of equal rank happen to be near neighbours, quarrels and even shedding of blood are a very common thing among them, and their very retainers cannot meet without strife."[42] "The retainers of a lord are ready to take part in his quarrel, be it just or unjust, if they only have a liking for him, and with him, if need be, to fight to the death."[43] Some of them could put in the field on occasion a force no whit inferior to that of the king. In the reign of James II. the Earl of Douglas had 30,000 or 40,000 men ever ready to answer his call.[44] The Highland chiefs could between them muster 70,000 or 80,000 men.[45] These numbers seem to be considerably overestimated, though the

[40] "Greater Britain," 190.
[41] *Ibid.*, 218-219.
[42] *Ibid.*, 48.
[43] *Ibid.*, 47; *cf.* 384.
[44] *Ibid.*, 383-384.
[45] *Ibid.*, 358.

testimony of the Spanish ambassador, Ayala, who, in the reign of James IV., tells us that two of the Scottish earls in his time could bring 30,000 men into the field,[46] lends some weight to such statements. Subjects so powerful were an ever-present menace to the security of the kingdom, to the common good, and to orderly government. A vigorous national State could not develop where the sense of a common citizenship and of responsibility for public order was so weak. Under such conditions terror might be a necessary adjunct of good government, though, as James found to his cost, it was a dangerous one to employ, and could only be of permanent avail if coupled with prudence and caution. James, like some of his successors, was lacking in these qualities of the statesman, though he combined a cultured mind and some skill as a poet and musician with remarkable bodily vigour and strength of will.

During the minority of his son, James II., who succeeded at the age of seven,[47] his work of strengthening the crown suffered a temporary check. Two of the late king's ministers, Crichton, who became Chancellor, and Livingstone, shared the supreme power, though with recurring friction, and attempted to deal with the general anarchy in James's drastic manner. Menaced by the rivalry of the young Earl of Douglas, they invited him and his brother, along with Malcolm Fleming of Cumbernauld, to the Castle of Edinburgh, and summarily put them to death (November 1440). Both seem to have been self-seekers, and were erelong at feud over the right to misgovern the kingdom, Livingstone allying himself with the Earl of Douglas, the second successor of his murdered kinsman, who became Lieutenant-General of the kingdom, and the Earl of Crawford against the Chancellor, who was deprived of his office in favour of Bishop Kennedy of St Andrews. For several years this factious strife reigned supreme before the young king, who had happily inherited his father's energy, was able, with the aid of the forceful Bishop of St Andrews, to resume in 1449 the task of taming his wild barons. During this interval

[46] "Early Travellers in Scotland," 45.
[47] "Scotichronicon," ii. 514.

the chronicle of the reign tells of little else than fighting and slaughter among the contentious nobility, the Lieutenant-General and the Earl of Crawford playing the part of chief disturbers of the peace.[48] He broke the Livingstone faction by seizing, imprisoning, and arraigning Livingstone himself and two of his sons in the first Parliament held by him in person in January 1450, which decreed forfeiture against the father and sent his sons as traitors to the block.[49] Two years elapsed before the turn of Douglas—whom James suspected of treasonable "bonds" with Crawford (son of the above-mentioned) and other magnates—came. This suspicion seems to have been well founded. Unfortunately for his reputation, he not only followed his father's tactics of inviting the earl to the Castle of Stirling in order to get him into his power. Enraged at the earl's refusal to break his "bond," he improved on these dishonourable tactics by stabbing him and leaving his courtiers to complete the murder.[50] This brutal act of treachery was all the more shocking inasmuch as Douglas had been granted the royal safe conduct. The lawless spirit was evidently no monopoly of the forces of disorder, and in the feud with the mighty Douglas faction which ensued, the king had gravely compromised his position as the champion of law and order, and given this faction a substantial ground for continuing their defiance of the royal authority, thus outrageously misused. Little wonder that the earl's brother, James, who succeeded him, appeared at Stirling and with blast of horn proclaimed this defiance and sacked and burned the town as a gage of war *à outrance*, "speaking right slanderfully of the king," adds the chronicler. In spite of baronial crime it is really somewhat difficult at times in the history of Scotland in this rough age to maintain, in view of royal counter crime, that the crown was the invariable symbol of law and justice against a factious and turbulent nobility.

At the same time James, like his father, could make use of constitutional forms to give validity to his authority,

[48] Ane Schort Memoriale of the Scottis Corniklis, usually cited as the Auchinleck Chronicle, from the fact that it ultimately came into the possession of Lord Auchinleck.

[49] *Ibid.*, 42.

[50] *Ibid.*, 46-47.

however arbitrarily used, and got the Estates to whitewash him in June 1452 of this brutal outrage.[51] The brothers of Douglas repeated their defiance by affixing a placard to the door of the Parliament House, "declining from the king, saying that they would not hold of him nor with him, with many other slanderous words, calling them traitors that were of his Secret Council." [52] In the trial of strength with the earl and his faction which followed, James's energy and military ability carried the day, the Estates duly completing his triumph by attainting the fugitive earl and his kindred of high treason, and confiscating their lands in favour of the king.[53] For the next five years he was master of the kingdom, and but for the explosion of a bombard that killed him at the siege of Roxburgh in 1460, in the thirtieth year of his age, he would probably have continued to play the part of strong ruler with success and with benefit to the people. His military capacity and unconventional affability made him popular with the soldiers, and the legislation of his reign evinces a marked desire to improve the material condition of his subjects. By his energetic rule and his appropriation of confiscated lands he left the royal authority even stronger than at the close of his father's reign.

He left, too, once more as his successor a boy, but two years older than he himself had been at his accession. But his vigorous, repressive policy had not been without its good effects in bringing home to the magnates the virtue of subordination. Moreover, for the first five years of his son's reign the influence of Bishop Kennedy continued to make for effective government,[54] in spite of differences with the Queen Mother, Mary of Gueldres, and her party, and the defiant attitude of the Lord of the Isles. After the forceful bishop's death in 1465, there was a recrudescence of faction in the form of one of those nefarious "bands" between

[51] "Acts," ii. 73.

[52] "Auchinleck Chron.," 48.

[53] "Acts," ii. 75-77 (1455).

[54] Boece, "Scotorum Historiæ," lib. xix. 383. Administrabatur autem rei summa, ut nunquam alias, puero regnante commodissime. Incipereque nostri multa tranquilitate frui, idque maxime Jacobi Kennethi consilio et autoritate, viri sane multum excellentis civili prudentia.

Lord Boyd and several other schemers for power and its spoils. But the ascendancy of the Boyd faction, which seized the king and wielded the government for a couple of years, was cut short by the counter stroke of their opponents, who rid the king of this thraldom, and in a Parliament at Edinburgh in 1469 decreed death and forfeiture against them as traitors. From this sentence Lord Boyd and his son, the Earl of Arran, who had married the king's eldest sister, saved themselves by flight. The confiscation of their estates farther augmented the revenues of the crown. In the Parliament which enacted this sentence the great nobles appear, along with the prelates and burgh representatives, as the vindicators of the royal authority against its subverters,[55] and they loyally co-operated in reducing the defiant Lord of the Isles to submission at the price of the annexation of part of his possessions, including the great earldom of Ross, to the crown.[56]

Though the young king had not inherited the energetic character of his father and grandfather, the first twenty years of his reign were thus comparatively free from baronial disturbance. In marked contrast stands the later part of it, which witnessed a series of crises that ultimately closed in civil war and in his death at the hands of his insurgent nobles. How far the king himself was responsible for this unfortunate development it is difficult to say, owing to the inadequacy and obscurity of the records of his reign. In contrast to his father, he had no taste and little capacity for military adventures. Like his grandfather, he was a lover of art and letters, with which, in the fashion of his age, he combined the belief in astrology and witchcraft, and showed a marked preference for the society of men of similar tastes. It was the age of the Renaissance, and in more favourable conditions he might have acquired fame as one of its patrons, and played a serviceable part in raising his country to a higher stage of culture and refinement. As it was, Ferrerius justly praises his patronage of art and literature, and some of those whom he distinguished by his lavish liberality seem by their talents to have been

[55] "Acts," ii. 93; *cf.* 186. [56] *Ibid.*, ii. 113.

worthy of his favour. Ferrerius tells us that John Ireland, whom he promoted to a rich living, was among the most distinguished of the Sorbonne doctors of the day—eminent alike for his culture, piety, and the gift of popular discourse. Roger, whom he made a knight, was a highly accomplished musician.[57] But the influence of the Renaissance had not penetrated to Scotland in any appreciable degree, and his rough barons could hardly be expected to admire a king who held the arts in higher esteem than the ruder accomplishments of arms. Moreover, Ferrerius adds, and Leslie and Buchanan repeat, that James further estranged the barons by promoting to honour and office a number of other favourites, including Cochrane, a master mason, and Hommil, a tailor, belonging to the lowest dregs of the people.[58] He subsequently speaks of them, however, in much more favourable terms, and says that they had distinguished themselves in various arts and handicrafts.[59] They were evidently not the worthless characters that the later chroniclers depict, and it would appear that the real offence of the king in the eyes of the nobility was his preference for men who, though of humble origin, seem to have merited his patronage by their ability. According to Ferrerius, some of them, such as Ramsay and Preston, were scions of noble families. James might justifiably conclude that commoners of ability might better serve the State than factious magnates, who had too often under his predecessors misgoverned it, and brought it to the brink of disintegration by their lawlessness and lust of power. The later chroniclers, indeed, describe their management of affairs as execrable, and James may have been guilty of an error of judgment in yielding to these favourites a dominating influence in the government. But Leslie, Pitscottie, and Buchanan seem to be merely retailing the one-sided version of their conduct which was current among their aristocratic opponents, who had an interest in blackening their memory in order to justify

[57] Continuation of Boece, 391. A treatise on Penance and Confession in the Asloan MS. is assigned to Ireland.

[58] Nonnullos infimæ plebir homines nimia quadam facilitate ad honores in aula sua maximos promovet. *Ibid.*, 391.

[59] *Ibid.*, 395.

their violent proceedings against them and the king. The one substantial fact against their régime mentioned by the chroniclers is their debasement of the coinage,[60] and for the prevailing discontent on this ground there seems to have been some justification, though this expedient had been in operation in the previous two reigns. The main grievance against these officials seems to have been the wounded susceptibilities of the nobles over the royal preference for men whom they regarded as usurpers of their rightful place in the work of government.

Whether James's partiality was politic is another matter. It seems to have been at the bottom of the disagreement between him and his brothers, the Duke of Albany and the Earl of Mar, men of the conventional militarist type, who did not share his refined tastes, and apparently did not conceal their contempt for him and his associates. The breach between them came to a crisis in 1479, when both the brothers were imprisoned, and while Albany managed to escape to Dunbar and thence to England, Mar died in durance, an unfounded suspicion ascribing his death to foul play. The quarrel in the royal family was followed by one with Edward IV., and hostilities with England in the interest of Louis XI. of France, of which the exiles, Albany and Douglas, took advantage to avenge their wrongs. Of this opportunity the discontented nobles took advantage to rid themselves of the hated favourites. At Lauder, where James had concentrated an army for the invasion of England in the summer of 1482, they seized and unceremoniously hanged them in defiance of the royal inhibition, and instead of proceeding with the invasion, placed the impotent king under ward in Edinburgh Castle.[61] The advance of an English army compelled the magnates, who now administered the kingdom, to restore Albany, who for a short time became all powerful with the title of Lieutenant-General.[62] But they did not relish the Lieutenant-General's régime, and in spite of an apparent reconciliation between the royal brothers,

[60] Ferrerius, 395.

[61] *Ibid.*, 395; Pinkerton, Chronicle given in vol. i. of "History of Scotland," 502-503.

[62] "Acts," ii. 163.

James succeeded by skilful intrigue in driving him once more across the Border, and in getting the Estates to attaint him as a traitor.[63] For his secret treaties with Edward IV., in which he undertook to recognise the English king as his overlord in return for his assistance in securing the Scottish crown, Albany richly deserved to be cast out, and a desperate attempt, along with the exiled Douglas, to retrieve his position was crushed at Lochmaben. His flight this time proved final, whilst James contented himself with immuring Douglas, who was taken prisoner, in Lindores Abbey. According to Ferrerius, he was clement even to imprudence. "He so abhorred the effusion of human blood that he more rarely than was expedient inflicted punishment on the guilty."[64]

In spite of this mildness and his pacific disposition, the nobles who had defied his authority so brutally at Lauder dreaded his vengeance.[65] He had, at all events, as much reason to distrust them as they had to fear him, and soon reverted to the practice of ignoring them for more congenial ministers, such as Sir John Ramsay, whom he made Lord of Bothwell, in the work of government. Apprehension and resentment alike erelong eventuated in another conspiracy and a civil war, in which the king, supported by the northern barons, was arrayed against the southern barons, who set up his eldest son as a rival king, and lost his crown and his life in the fight at Sauchieburn.

"You shall find many a king both at home and abroad who was worse than James the Third," judges Major. Unfortunately, his meagre account of the reign does not supply us with the grounds on which he based this considerate judgment. Ferrerius, who is fuller, tends to confirm it, though his estimate of the king is rather contradictory. He vacillates, in fact, between admiration and depreciation, according as he dwells on his good qualities as man and ruler, or voices the resentments and prejudices of the rough nobles against him and the obscure men whom he preferred to them as ministers. The real James, though apparently not too well fitted to cope with baronial insubordination, seems to have striven to inaugurate a new system which would have

[63] "Acts," ii. 147. [64] Cont. of Boece, 401. [65] *Ibid.*, 399.

ignored prejudice and given more scope to personal merit and ability in the work of government. His judgment may have been at fault in the choice of men of similar tastes. His aim was praiseworthy, and he seems in some respects to have been in advance of the time. He disliked war, and would, for instance, have preferred to put an end to the old feud with England by a marriage scheme between the royal families of the two kingdoms. In this he was wiser and more prescient than most of his subjects, who resented his pacific policy as "the inbringing of Englishmen to the perpetual subjection of the nation." [66] This was one of the grievances of the magnates whose revolt led to his death. But his policy of intermarriage did not necessarily imply any such sinister design on his part, and the fact that a man like Major repeatedly advocates such a policy and expatiates on its benefits to both kingdoms, shows that there was not a little to be said in its favour from the point of view of the national interest. It was, in fact, in this direction that the ultimate solution of the problem of the relations of the two countries was to lie. Nor was his patronage of the arts the contemptible thing in a ruler that most of his subjects esteemed it to be. It only shows that the king in his preference for such accomplishments was, in this respect also, in advance of his subjects. The contempt which it inspired in both barons and people, and which the chroniclers indiscriminatingly reflect, was certainly unenlightened. The main secret of his unpopularity seems to have lain in aristocratic class prejudice, and inability to appreciate the more spiritual tendencies of a new age which he represented. The violent scene at Lauder is a sufficient proof of the essential barbarism of these champions of good government. Moreover, the final conspiracy that undid him was by no means solely actuated by zeal for the common weal. Professions of this kind appear, indeed, in the documents which the Estates put forth in exoneration of the rising against him. But parliamentary documents of this sort are absolutely untrustworthy as a reflection of either motives or acts, for the Scottish Estates were only too ready

[66] "Acts," ii. 210.

to give their imprimatur to the professions or deeds of the dominant personality or party for the time being. James could show considerable skill in managing men on occasion and considerable resource in dealing with an emergency. Even from this point of view he was not the unmitigated failure that the historians are wont to depict, and the fact that he was able to rally to his standard many of the northern barons in the final struggle with the aristocratic opposition is sufficient evidence that he was less unpopular than the chroniclers would have us believe. At the same time, apart from the debatable question of his character as a ruler, it is evident that the successful rising which put an end to his rule and his life had once more brought the kingship into a state of impotence comparable to that in which James I. found it at his actual accession to the throne.

CHAPTER II

THE KINGSHIP AND ITS EXERCISE—FROM JAMES IV. TO QUEEN MARY

UNDER his son, who succeeded him as James IV., the kingship recovered its authority and attained an unwonted prestige. A reign that had begun in revolt, in which the new king had shared, did not promise well for the effective exercise of the royal authority. The revolt had, however, been ostensibly undertaken with the consent of the heir to the throne "for the common good of the realm"[1] against the late king and "his perverse councillors." Theoretically, the insurgent barons had only done their duty as good subjects in delivering the country from a bad king and his pernicious advisers, and in transferring their allegiance to another. The theory, however questionable in fact, at least assured their loyalty to the actual king, and the moderation shown to the opposite faction enabled James to start his reign with surprisingly little disaffection. With Angus as Lieutenant-General and Argyll as Chancellor, the new Government contented itself with forfeiting some of the late king's ministers, including Lord Bothwell and Hope, the king's Advocate.[2] It appointed a number of lords to preserve order in the various shires.[3] There seems, indeed, to have been some popular indignation over the tragic death of the late king, in spite of the specious sophistry of the Estates in exoneration of the men in power, and the Estates subsequently found it expedient, in view of "the heavy murmur and voice of the people over the death and slaughter of our late sovereign lord's father," to offer a reward for information as to his murderers. But there was

[1] "Acts," ii. 210-211. [2] *Ibid.*, ii. 201 f. [3] *Ibid.*, ii. 208.

only a flicker of rebellion in the north, and the Earl of Lennox and Lord Lyle, who turned against their associates and essayed a rising in the south, were energetically dealt with.[4]

For the effective government of the realm a Privy Council of lords, temporal and spiritual, was instituted and made responsible to the king and the Estates for their action [5] (February 1490). This looks like an attempt to inaugurate real responsible government. But as usual the Estates were a very secondary force in government, and merely performed the function of formally sanctioning the decrees of those in power. As the character of the reign shows, this meant mainly the will of the king himself, who erelong appears as the master of the State—the vigorous director alike of policy and administration. The keynote of the reign is the strong personal rule of the monarch. In this, as in other respects, its history shows the same tendency towards the concentration of power in the crown and the moulding of the national State under its auspices as is apparent in England under the Tudor sway, France under the later Valois kings, and in the Spain of Ferdinand and Charles V. From 1490 to the fatal year 1513, Scotland shows the distinct trace of this contemporary tendency in the vigorous exercise of the royal authority, which marked the transition from the feudal to the national State under the strong ruler in England, France, and Spain. James bade fair to do for Scotland what the first Tudor was attempting to do for England—to make the personal monarchy the means of establishing an orderly, cohesive State instead of the old periodic feudal anarchy which had repeatedly threatened its disintegration. But for the disaster of Flodden, which, with the fatality that dogged the Stewart kings, cut short his career, his work might have proved decisive in shaping the future of the nation. His vigorous régime in the maintenance of order and the administration of justice was not seriously hampered by internal disloyalty or turbulence except among the wild Border rievers and the equally wild Islesmen whom, after a protracted struggle, he taught for the time being to fear

[4] Buchanan, "History," ii. 225. [5] "Acts," ii. 220.

the royal authority and the law of the land.[6] "The present king," says Ayala, speaking of the Highlanders, "keeps them in strict subjection. . . . None of the former kings has succeeded in bringing the people into such subjection as the present king."[7] All the chroniclers are agreed in extolling his internal administration and emphasising the general tranquillity which it ensured. By general consent he was the most popular king since Robert I., and this popularity was due in part to his attractive personality, in part to the fact that he understood how to combine moderation with severity in the maintenance of law. His government was a mixture of firmness and prudence.[8] "He is a severe judge," noted Ayala, "especially in the case of murderers . . . and because he is a very humane prince, he is much loved."[9] "He protected the people," says Boece, "from injury by the nobles, and he kept the nobles in harmonious peace, partly by his moderation and liberality, and partly by the fear of punishment."[10]

The improvement in the state of the country in this and other respects struck the Spanish ambassador. "Since the present king succeeded to the throne," says Ayala, "the Scots do not dare to quarrel so much with one another as formerly, especially since he came of age. They have learned by experience that he executes the law without respect to rich or poor. I am told that Scotland has improved so much during his reign that it is worth three times more now than formerly."[11] "There is as great a difference between the Scotland of old time and the Scotland of to-day as there is between good and bad."[12] To a degree in which it could be said of none of his predecessors, his will was law; but the submission with which his subjects yielded to his personal rule, seems to have been inspired by his sense of justice and his beneficent administration as well as his strong will. "He told me," says Ayala, "that his

[6] "Acts," ii. 249; Leslie, "History of Scotland," ii. 134.
[7] "Early Travellers in Scotland," 46.
[8] Buchanan, ii. 261. [9] "Early Travellers," 40-41.
[10] Lives of the Bishops, quoted in "Days of James IV.," 71.
[11] "Early Travellers," 43.
[12] *Ibid.*, 49. These estimates must be taken with some qualification.

subjects serve him with their persons and goods exactly as he likes." [13] Under him the kingship was the decisive factor in government and policy. Ayala says that he lent a willing ear to his counsellors, and decided nothing without asking their advice. But he adds that in important matters he acted according to his own judgment. His faith in himself, his sense of his kingly rights, were absolute. "He esteems himself as much as though he were the lord of the world." [14] The personal monarchy, as in the case of the contemporary rulers of England, France, and Spain, whose example seems to have exerted an influence on the Scottish king,[15] is thus the characteristic feature of his rule. On the whole it was justified by the remarkable advance in the national well-being and prestige during his reign. Scotland experienced a prosperity which it had not known since the days of Alexander III., though it owed something to the gradual advance which, in spite of recurring internal disorder, had been taking place since the accession of James I. It became a power to be reckoned with in international affairs. The goodwill of its king was courted by Henry VII. and Ferdinand of Spain as an essential adjunct of their foreign policy. Henry, in fact, rated his friendship so high that he bestowed on him his daughter Margaret, even at the risk of the ultimate union of the crowns, which some of his councillors feared might be prejudicial to the interest of England.[16] Whether James himself foresaw this contingency does not appear. At all events he brought to fruition the policy of intermarriage, which, as the tool of his father's enemies, he had resisted, and which cost his father his life. In this respect alone his rule was epoch-making in the history of both kingdoms. In his creation of a formidable navy he evinced his prescience of the value of sea power for this island realm, and thereby also enhanced his influence in international politics. The pope recognised

[13] "Early Travellers," 40. [14] *Ibid.*, 41.

[15] Buchanan thinks that the foreign influence on the Scottish kingship was already in operation in the reign of James III., who was, he says, misled into imitating the "tyrannic" methods of Edward IV., Charles the Bold, and Louis XI., ii. 221.

[16] Leslie, ii. 117-118.

this enhanced influence by conferring on him the title of "Protector of the Christian Religion," and presenting him with a purple hat, variegated with golden flowers, and a sword with a gold hilt and scabbard.[17]

Ayala extols his literary accomplishments,[18] though Buchanan denies him the merit of this distinction. But he seems to have inherited his father's interest in art and literature, and he certainly gave scope to the new intellectual life of the age by establishing the printing press in Edinburgh, that potent instrument of the dissemination of the new culture. In the same spirit he showed a genuine interest in education, as the Act of 1496 shows.

On the other hand, the personal monarchy was not without its dangers in so far as it tended to irresponsible power. James's inordinate self-esteem made him at times inclined to act in accordance with impulse rather than with reason. The instinct of domination, characteristic of some of the Stewarts, was only too apparent in some of his actions. Ramsay, the quondam Lord Bothwell under his father, and later the spy of Henry VII., speaks of his inveterate "wilfulness" and the impossibility of dissuading him from any course on which he had set his mind. He was evidently influenced by that tendency towards absolutism to which the personal monarchy was tending in France and Spain. Certain it is that the "wilfulness," of which Ramsay speaks, was on several occasions allowed to carry him away against the expressed will and better judgment of his advisers. He insisted, for instance, in espousing the cause of a wretched pretender like Perkin Warbeck, and gravely compromising his relations with Henry VII., in spite of the strong arguments of the wiser members of his Council.[19] Similarly, he refused to listen to the warnings of Bishop Elphinstone and others of his councillors against the policy of declaring war on Henry VIII. on behalf of Louis XII. of France, which led to the disaster of Flodden.[20] He was equally stubborn in resisting the advice of the old Earl of Angus not to fight

[17] Leslie, ii. 123; Boece, Lives of Bishops of Murthly and Aberdeen, "Days of James IV.," 105.

[18] "Early Travellers," 39-40.

[19] Buchanan, ii. 233.

[20] "Days of James IV.," 137-139.

at Flodden. "If," he declared, "there were 100,000 Englishmen against him, he would fight them." [21] Unlike his father, he was imbued with the militarist spirit of the age, and was too prone to seize the opportunity of gratifying it. Though to his credit he exerted himself to curb the bellicose spirit of his contemporary rulers, and vigorously protested against the aggressive policy of Pope Julius, Henry VIII., and Ferdinand against Louis XII., he could not resist the temptation of taking part in the war in the interest of France, in spite of the arguments of Elphinstone and others against intervention. "He loves war so much," notes Ayala, in reference to the conclusion of the Warbeck affair, "that I fear, judging from the provocation he receives, that the peace will not last long." [22] The personal monarchy might be a great improvement on the anarchic régime of a turbulent nobility. But even under James IV. there was room for the control of the monarch by an ordered opposition. Unfortunately, though the feudal Constitution provided the machinery for such an opposition, it was too undeveloped and too amenable to the dominant influence in the State for the time being to be an effective check on the régime of either a wilful king or a factious nobility. The result in the case of the king was the disaster of Flodden, and another lengthy minority, during which faction government once more undid the good effects of the vigorous exercise of the kingly power. Even as regards his internal administration, Buchanan is of opinion that he died just in time to save his popularity. He was so extravagant, and consequently so impecunious, that he would have been compelled, he thinks, to impose heavy taxes, and would thus have ended by alienating his subjects.[23]

For the next fifteen years the political history of Scotland is largely that of a scramble by the chief magnates to monopolise the government. This meant the emergence once more of faction, according as one set of partisans supported or opposed the man or men in power for the time being. "The realm (being) now in such distress,"

[21] Buchanan, ii. 253. [22] "Early Travellers," 41.
[23] "History," ii. 261-262.

says Leslie, " all drew to factions, some to defend the queen, some the nobility ; all studied their particular profit, either occupying his neighbour's lands with force, or his neighbour's goods wrongfully, however he could." [24] " Of a surety," wrote Dacre to Henry VIII. in June 1514, " there is neither law, nor reason, nor justice at this day used nor kept in Scotland." [25] " The people were so oppressed," noted Gavin Douglas, " that they would be glad to live under the great Turk to have justice." [26] Under such conditions the kingship could only be, as in past emergencies of this kind, the mere foil of contentious politicians. The Duke of Albany, the son of the exiled brother of James III., who was invited by the Estates from France to undertake the defence of the realm,[27] displaced Queen Margaret as Regent, and took possession of the boy king by force. Albany was more French than Scottish, and could not in fact speak the native language. He was, however, the prospective heir to the throne in the event of the death of both of Margaret's surviving sons, and he had thus a stake in the country. But he was not otherwise fitted to govern effectively in such trying conditions, and his two visits to France, the first of which was prolonged for four years, gave free scope for the factious spirit which his presence only with difficulty held in check. The Queen Mother, the Earl of Arran as head of the Hamilton faction, the young Earl of Angus as head of the Douglas faction and husband of the Queen Mother, from whom she erelong became estranged, kept the land in a seethe of intrigue and strife. Albany's spasmodic tenure of power, which came to an end in 1524, was mainly useful as a foil against the danger of English aggression during this factious interval. He was the champion and the representative of the French interest and the old alliance in the international complications which arose out of the rivalry of Francis I. and Charles V., and in which Henry VIII. took the side of the emperor. Under Albany's auspices the country still adhered to the French alliance

[24] " History," ii. 155.
[25] " Letters and Papers of Henry VIII.," i. 2, No. 2973.
[26] Herkless and Hannay, " Archbishops of St Andrews," ii. 111.
[27] " Acts," ii. 281-282.

as an essential safeguard of its independence. But as the result of the marriage union of 1503, there was now a party that, from motives of policy or personal interest, favoured an understanding with England, and this party was henceforth to play an increasingly important part in moulding the national history during the next forty years.

After Albany's final departure in 1524, four years of civil war and anarchy intervened before James, who had been proclaimed actual king at the age of twelve at a meeting of the Estates in this year,[28] succeeded in freeing himself from the domination of Angus and his faction, who managed to oust the Queen Mother and her party in the struggle for his possession. During these years the country reached the nadir of misgovernment and disorder. Albany had at least preserved, though rather feebly, some respect for the central authority. After his withdrawal, the boy king and his council represented the mere semblance of authority as between the dominant Angus and his rivals and enemies. Contemporary historians like Leslie and Buchanan and the poet, Sir David Lyndsay, bear witness to the complete collapse of government in a welter of factious intrigue and violence, though Angus made some efforts to repress the wild Borderers. "On the departure of the Regent," says Buchanan, "the country became a scene of complete anarchy and confusion."[29] "Factions and parties," says Leslie, "were throughout all the land. Everything was so perturbed and out of order that the authority of magistrates was not respected: stealing, rieving, slaughter, the innocent put down, the guilty let go free."[30] On this anarchy James at last, in his seventeenth year, succeeded in putting a curb by convening a number of the nobles, opponents of Angus, to Stirling, issuing at their advice a proclamation banishing Angus to Moray, and marching on Edinburgh. On his approach Angus and his associates were fain to retire and ultimately to seek safety across the Border, whilst the Estates decreed his outlawry and forfeiture along with his brother, Sir George Douglas, and his uncle, Archibald, as

[28] "Acts," ii. 286. [29] "Acts," ii. 288.
[30] "History," ii. 205.

guilty of treason in seizing the king and keeping him in servitude.[31]

James now showed that he had inherited his father's energy by his vigorous efforts to retrieve the disorders of his long minority. Unfortunately, his education under Gavin Dunbar, the future Archbishop of Glasgow, had been interrupted by his "erection" as actual king at the age of twelve, and under the régime of Angus he had been encouraged to pass his time in amusement and indulge his passions in order to reconcile him to his thraldom. But he had much natural ability and, according to Buchanan, he afterwards attempted to make up for his faulty education by acquiring a knowledge of the laws and institutions of his country.[32] Leslie also credits him with natural shrewdness and judgment,[33] and Sir David Lyndsay, who in his youth had been his usher, tells us that as a boy he was "high of ingine" (quick witted) and "right inquisitive" (apt to learn). Like his father and great-grandfather, he was affable and easy of access. He deservedly earned the title of "the poor man's king"[34] by his deep interest in the common people, and his adventurous association with them long lived in the popular memory. He was ever on the alert to protect them from injustice and oppression. He set himself to enforce the law, and the establishment of the College of Justice is the permanent memorial of his devotion to the task of restoring and maintaining order and security. To the Border rievers he gave short shrift, as the Armstrongs and other freebooters found to their cost. He devoted a great part of his early actual reign to the suppression of these desperadoes, tracking them to their lairs and placing their patrons and protectors among the Border barons under ward. In a couple of years he had inspired these ruffians with a salutary awe of the king, if not of the law. "In the depth of winter," says Buchanan, in reference to these repeated repressive expeditions, "he continued day and night on horseback that he might surprise the robbers in their homes, and the rapidity of his motions struck them

[31] "Acts," ii. 322.
[32] "History," ii. 323-324.
[33] *Ibid.*, ii. 261.
[34] Leslie, *ibid.*, ii. 261

with such terror that they abstained from their depredations as if he had been always present." [35] With the restive Islesmen his methods were less drastic, though not less effective, and like his father he gained their allegiance by the tact and resource that knew both how to overawe and attract.

His attitude towards the nobility was marked by the same watchfulness and promptitude to check intrigue and insubordination. His experience under the yoke of Angus had not only filled him with an inveterate hatred of the whole Douglas kin; it had made him distrustful of the loyalty of the magnates concerned in the factions of his minority, and the treasonable intrigues directed by the exiled Angus and his brother, Sir George Douglas, served to quicken his suspicions. To rule with the strong hand seemed the only possible policy. He subjected Bothwell and Argyll to temporary imprisonment, and compelled Morton and Crawford to resign their earldoms. He brought Lady Glamis, the sister of Angus, and her brother-in-law, the Master of Forbes, to trial on a charge of conspiring the king's death in conjunction with their exiled kinsmen, with the result that both were found guilty and executed, the lady by the barbarous method of burning. Another victim of the treason charge, which also included, according to Buchanan,[36] intrigues with the Douglases and a plot to kill the king, was Sir James Hamilton of Finnart, who had long been in high favour with James. The charges against the Master of Forbes and Lady Glamis are merely stated in the record of their trials without the evidence on which they were based,[37] and it is not easy to come to a definite conclusion on the subject from the information afforded from other sources. The bare official record even is lacking in the case of Hamilton. Both Forbes [38] and Hamilton were desperate characters, and assassination plots are not beyond the range of probability. The assizes before which Lady Glamis and her brother-in-law were tried seem, to

[35] "History," ii. 324.

[36] *Ibid.*, ii. 320.

[37] Pitcairn, "Criminal Trials," i. 184 f.; *cf.* "Reg. Sec. Sig.," ii. 122, 127.

[38] "Reg. Sec. Sig.," ii. 287-288.

judge from their names, to have been composed in both cases of persons of repute who found the evidence conclusive. But there is room for doubt whether it was not concocted for the purpose and whether the jury, in the face of the royal suspicions against the accused, were sufficiently independent or capable in testing the testimony placed before them. Whether the outcome of suspicion or justice, their execution tended to aggravate the strain between king and nobility. James seems to have inherited something of his grandfather's aloofness from the nobility as a class, and had not his father's gift of attracting all classes to his person. The result was, towards the end of his reign, a spirit of simmering disaffection which, while refraining from open rebellion, showed itself in the growing estrangement between king and nobility on grounds of policy as well as personal interest.

In his striving to assert and maintain the royal authority, James adopted the policy of cultivating the goodwill of the churchmen, and preferring them for high offices of State as a foil to the great nobility. Throughout his active reign that of Chancellor was held by Gavin Dunbar, Archbishop of Glasgow. He gave the Privy Seal to David Beaton, Abbot of Arbroath, and employed him as his Ambassador in England and France.[39] As the successor of his uncle, James Beaton, as Archbishop of St Andrews, and as Cardinal, he became the ruling spirit in both Church and State during the last years of the reign. Under his influence James was confirmed in his twofold determination to uphold the Church as the mainstay of the royal authority, and to preserve the old alliance with France as the guarantee of its independence. His determination in both respects intensified the estrangement between him and the nobles. To them the churchmen were obnoxious as their rivals in the government, the usurpers of what they deemed their rightful vocation. To a section of them at least they were further obnoxious as the protagonists of a foreign policy which they deemed detrimental to the national interest. Apart from the treasonable subservience to England of men like the exiled Angus and his

[39] "Reg. Sec. Sig.," i. 583 (1529); ii. 202, 325, 344, etc.

abettors at home, the English party had substantial reason for seeking to displace the old Franco-Scottish alliance by an understanding with England. This party had existed since Flodden. The evidence of the English State Papers throughout the reign of Henry VIII. reveals the existence of friction between French and Scots who, as Albany learned, were beginning to get impatient of the policy of involving them in war for the benefit of France. English bribes might help to foster this feeling, and the sordid intrigues of Henry to undermine Scottish allegiance in his own interest is an ugly feature of this change of sentiment in favour of an English alliance. But French bribery was equally profuse in this Anglo-French competition to get control of Scotland in their respective interests.[40] At the same time, in view of the deplorable effects of the insane policy of periodic war and frequent Border raids between the two nations, the plan of a permanent understanding with England was one which on its own merits might well appeal to patriotic Scotsmen, like Major, who were not actuated by unworthy motives in espousing it. In ignoring this tendency and clinging to the French alliance, James might seem to be choosing the path of safety in the interest both of the kingship and the national independence. Henry's policy had not been such as to inspire confidence in his protestations towards Scotland. Having failed to win over James to his plan of a union, he finished by reviving the old claim to superiority over Scotland. Such a claim was at least antiquated, and was fitted to inspire suspicion of his unionist professions. It was a mistake in tactics, and shows the egotistic character of the man. It gave a justifiable force to the arguments of those who, for their own purposes, contended for a French in preference to an English alliance.

Whether his own visit to France and his French marriages had the effect of augmenting his sense of his kingly power, it is impossible definitely to say. The influence of his second wife, Mary of Lorraine, familiar with the later Valois system of absolute government, and the example

[40] Buchanan, ii. 285.

of his father-in-law, Francis I., the champion of unlimited monarchy, probably tended in this direction. The tendency certainly came into operation under the régime of the Queen Mother and her daughter, Mary Stewart, and had the old alliance maintained itself it might ultimately have come to fruition in the same desuetude of constitutional rights as had taken place in France under Valois absolutism. James himself at least was destined to find that the policy of maintaining this alliance with the aid of the Church against the will of a disaffected nobility was a mistaken one. As Albany had experienced twenty-eight years earlier, the nobility were not minded to do his bidding and make war on England in the interest of France,[41] and for the sake of a king who, they apprehended, was ready to make use of arbitrary and absolutist methods at their expense. The story of his plan to ruin a large number of the nobility by wholesale confiscation seems to be a mere concoction of suspicion or malice. But the fact that it could be concocted and believed is significant of their estimation of his system of government, and it led to the disaster of Solway Moss and the tragic death of the thwarted king.

Nor was his policy of allying himself with the Church in the interest of the kingship against the nobility more prescient. His reign witnessed the beginnings of the Reformation in Scotland and of the attempt by the Church to repress it. The movement was the inevitable revolt against an institution which, by the testimony of friends and foes alike, was in a desperately degenerate state. James rightly resisted the attempts of Henry VIII. to persuade him, for political reasons, to follow his example and both strengthen his crown and reform the Church by forswearing the pope and reducing it to a department of State.[42] At the same time, in view of the incipient antagonism to an effete institution on the part both of the protagonists of evangelical reform and a discontented nobility, his policy of allying himself with the churchmen against both was a singularly shortsighted one. The

[41] Knox, "History of the Reformation," i. 80.
[42] Hamilton, "Papers," i. 66-68.

Church was unpopular both with nobles and people, and to seek in it the safeguard and buttress of his crown was to lean on what was ultimately to prove a broken reed.

After his death came the reaction under the Regency of Arran in favour of the Reformation and the English alliance. In March 1543 the Estates sanctioned the English translation of the Bible, and the negotiations of a treaty with England based on the future marriage of the infant queen with Prince Edward and the prospective union of the two kingdoms, subject to the preservation of the government and laws of Scotland as in times by-past.[43] It was a feasible solution of the age-long international problem, "considering," in the words of Knox, "that thereby all occasion of war might be cut off, and great commodity might ensue to the realm." [44] Unfortunately, this otherwise statesmanlike measure was the fruit of bribery as well as concern for the weal of the realm. "The hands of our lords were liberally anointed," says Knox significantly (referring to the release of the nobles captured at Solway Moss), "besides other commodities promised and of some received." [45] Moreover, Arran was not the man to persist in such a radical policy in Church and State against the opposition of the French party led by Beaton and the Queen Mother. He was unstable and indecisive. "Whatever he determineth to-day," complained the English ambassador, Sadler, in April 1543, "he changeth to-morrow." [46] He went the length of signing the treaty negotiated by the commissioners of the two countries.[47] But he was no match in force of will or in statecraft for the resourceful cardinal, who erelong compelled him to revert to the policy of antagonism to both the Reformation and the English alliance. Under the pretext that Henry had broken the peace by seizing Scottish ships in English harbours, as a retort to the change of policy, the Estates in December 1543 abrogated the treaty and confirmed the alliance with France.[48] The result was another war which lasted intermittently till 1550, and exposed Scotland to the devastation of successive English invasions and the

[43] "Acts," ii. 411 f.
[44] "History," i. 102.
[45] *Ibid.*
[46] Sadler, "Papers," i. 115.
[47] Knox, i. 103-104.
[48] "Acts," ii. 431-432.

culminating disaster of Pinkie in 1547. The English policy of force both discredited and thwarted the plan of a union and retarded the Reformation movement. Hertford might win battles; he failed to win Scotland. The Scots were in no mood to appreciate the renewed offer of a union on very generous terms [49] at the point of the sword, and successfully maintained the struggle, with the aid of their French allies, until they were included in the peace of 1550 between England and France. In this year the French alliance and the old Church appeared to be more firmly established than ever. Ten years later both were permanently overthrown by the forces which, during the interval, had been steadily working towards the sudden climax of the Reformation of the Church, and the alliance, if not the union, with England.

This climax was the inevitable outcome of the régime of Mary of Lorraine, who succeeded in 1554 in ousting Arran from the Regency. Her policy of governing Scotland in subservience to France with the aid of French officials alienated the nobility and revived the English party. She failed in her attempt in 1557 to involve Scotland in war with England in the French interest, the nobility refusing to follow her French commander, D'Oysel, across the Tweed for this purpose. "In no wise," they told the Regent, "would they invade England." [50] The attempt to vitalise the Church by the belated reform of abuses by means of the Provincial Council proved equally futile. On the other hand, the evangelical movement started by Patrick Hamilton and continued by Wishart had made considerable progress in spite of the martyrdom of its early protagonists. Under the direction of Knox who, besides paying a lengthy visit to Scotland in 1555-56, kept in touch with the movement from Geneva, it won a section of the nobility, including the Earl of Argyll, Lord James Stewart, natural son of James V., the Earls of Glencairn, Mareschal, Cassilis, Morton, Lord Erskine, John Erskine of Dun, and others of the minor barons. Whilst their patronage is liable to suggest at

[49] See MacKinnon, "Union of England and Scotland," 3.
[50] Knox, i. 255; *cf.* Leslie, ii. 371-372; Buchanan, ii. 391-392.

least mixed motives, there can be no doubt that the movement which, as "Lords of the Congregation," they directed, was not a mere outburst of aristocratic faction. Its mainspring was religious. It was actuated by a revulsion from a corrupt and effete Church towards a scriptural faith, and as the steadfastness of its martyrs showed during the previous thirty years of persecution, it was the expression of convictions stronger than death. It had taken a firm hold on the people of Ayrshire, Fife, Angus, and the Mearns, and it is a mistake to identify it with the merely political or personal interests of its aristocratic leaders and associates. Its true leader was Knox, and with Knox the religious motive was the all-compelling one, though he sought to utilise the co-operation of the nobility and the factor of the English alliance in bringing about the overthrow of the old Church and with it the old League with France.

Here, then, is a movement of new and far-reaching significance from both the religious and the constitutional points of view. In place of the corporate authority of the Church, its champions emphasised the indefeasible right of the conscience and judgment of the individual. Its martyrs denounced the use of this authority to suppress this right as "an unjust tyranny." [51] At first the victims of this "tyranny" were content to denounce and suffer for their faith, and the leaders of the movement, in a couple of petitions to the Queen and the Parliament, to crave toleration for their preachers and their meetings for worship, along with a thorough reform of the ecclesiastical estate.[52] But with the growth of the movement they adopted a more militant tone, and on the refusal of the Regent to present the petition to the Estates, they publicly protested at the meeting of November 1558 against the tyranny of the bishops, significantly adding that the blame of any tumult or violence that might arise on the score of religion would be at their door.[53] The popular restiveness was already, in fact, beginning to show itself in violent outbursts against the old Church, and when, three months before the meeting

[51] Knox, i. 250.

[52] For these petitions, see Knox, i. 301 f.

[53] Knox, i. 312-314.

of Parliament, the Regent, in deference to the pressure of the bishops, issued a proclamation forbidding the lieges to assemble in support of the reformed preachers, she was bluntly told by their spokesman, James Chalmers of Gadgirth, that they would defend them against their persecutors. "We avow to God we shall make a day of it. The bishops oppress us and our tenants for feeding of their idle bellies; they trouble our preachers and would murder them and us. Shall we suffer them any longer? No, madam, it shall not be. And therewith every man put on his steel bonnet." [54]

This militant spirit was intensified by the growing distrust of her government as tending to subvert the Constitution and even the independence of the country. She acted as if she were bent on introducing the French system of government into Scotland, and it is certain that she was prepared to sacrifice the independence and liberties of the kingdom in the interest of French aggrandisement. She made use of the services of Frenchmen in the administration, one of whom, M. de Roubay, became virtual Chancellor [55] in place of the discarded Earl of Huntly. Another, D'Oysel, the French king's Lieutenant in Scotland, who commanded the French troops quartered in Scottish fortresses, was her chief counsellor. She proposed to maintain a standing army and impose a tax for this purpose, and only desisted in deference to the spirited opposition of the nobility who, to the number of 300, met at Edinburgh and protested against the proposal as contrary to the privileges, laws, and customs of Scotland.[56] There was a widespread suspicion that she and her French ministers "had in their mind," in the words of Leslie, "to turn Scotland into a province of France." [57]

That there was ample justification for this suspicion is apparent from the secret transactions that preceded the marriage of the young queen to the dauphin in April 1558. In a series of secret treaties Mary agreed to gift her kingdom

[54] Knox, i. 258.
[55] Leslie, ii. 354; *cf.* "Register of Privy Council," xiv. 12, 13.
[56] Buchanan, ii. 387-390; Leslie, ii. 361-363.
[57] ii. 373.

to the King of France in the event of her death without issue, and to pledge her kingdom to her father-in-law as a guarantee of the repayment of the sums incurred by him on her behalf. These secret agreements were, moreover, to be valid and of binding effect, notwithstanding the public treaties by which she, her husband, and her father-in-law had undertaken to recognise the succession of the next heir by right of blood to the Scottish crown (Arran), and "to preserve the laws, liberties, and privileges of the kingdom to all and every one of their subjects." [58] These secret documents prove incontestably the unscrupulous and absolutist tendency of the government of the Queen Regent. They assume the right to override the declared will of the Estates in this crucial matter, and not only to ignore it in the future government of the country, but to surrender its constitutional rights and liberties in the interest of an alien power.

To ensure the realisation of this unscrupulous and treacherous policy it was essential not only to hoodwink the Estates, but to suppress the Reformation movement, and to this task the Queen Regent, discarding the temporising tactics of the previous four years, now bent all her energies. It was on this rock that her repressive, absolutist policy made shipwreck. The result of her attempt was the Civil War of 1559-60 and the establishment, in alliance with England, of the Reformation on the ruins of the old Church and the Franco-Scottish League. It was during this struggle that Knox, as the spokesman of the Anglo-Reform party, gave decisive utterance to the right of resistance to the royal power, arbitrarily, oppressively used. Mary of Lorraine, if Knox reports truly, now made no secret of her claim to use her power in such a cause without respect either to the pleas of the party of Reform, whom she denounced as "rebels," or the restraints of law or the Constitution. "In despite of you and your ministers both," she told the leaders of the evangelical party, "they shall be banished out of Scotland albeit they preached as truly

[58] "Acts," ii. 507 f. The secret documents are given in Labanof, "Lettres de Marie Stuart," i. 50 f.

as ever did St Paul." [59] To the Earl of Glencairn and the Sheriff of Ayr, whom they sent to remind her of her former promises, she curtly answered, "It became not subjects to burden their princes with promises farther than it pleaseth them to keep the same." [60]

The outlawry of the preachers in the beginning of May 1559 left the Reform party no alternative but to defend themselves. The presence of Knox, who had opportunely returned from Geneva, was a guarantee that they would no longer submit to what they regarded as "an unjust tyranny" in matters of conscience and religion.[61] "If," said he in a missive to the nobility in defence of his brethren, "they were 10,000 and we but 1000, they shall not murder the least of our brethren, but we (God assisting us) shall first commit our lives in the hands of God for their defence." [62] To Knox the question of resistance was first and foremost a question of fidelity to religious conviction. Romanism is idolatry, and against idolatry it is a sacred obligation to resist to the uttermost. His standard in this matter is the Old Testament, which not only prescribes resistance to idolatry, but enjoins the destruction of it. For him, therefore, resistance involves not only the forcible defence of the evangelical faith, but the suppression of the Roman Church. It is not merely a question of enforcing toleration, but of fighting for supremacy. In his religious fervour he had no true conception of religious liberty, and his argumentation in behalf of his policy of resistance is marked by his narrow religious outlook. On the other hand, a corrupt Church which insisted on outlawing and condemning to death those who professed allegiance to the Gospel, if not to it, deserved to be resisted and even suppressed, both on account of its scandalous corruption and as an insuperable obstacle to individual liberty and real religion. "As ye by tyranny," wrote Knox in a defiant missive to "the generation of Antichrist," "intend not only to destroy our bodies, but also by the same to hold

[59] Knox, i. 316.

[60] *Ibid.*, i. 316.

[61] See the documents issued by the Lords of the Congregation during the struggle, in Knox, i. 326 f.

[62] *Ibid.*, 333-334.

our souls in bondage of the devil, subject to idolatry, so shall we with all force and power, which God shall grant unto us, execute just vengeance and punishment upon you. Yea, we shall begin that same war which God commanded Isaiah to execute against the Canaanites; that a contract of peace shall never be made till ye desist from your open idolatry and cruel persecution of God's children. . . . Take this for advertisement." [63]

Unfortunately Knox and his party did not conceive of liberty consistently with the principle of individual right which they professed, though they intimated their willingness to submit the points in dispute to a public disputation.[64] He undoubtedly spoilt his case by such wild analogies as the extermination of the Canaanites. But by their insistence on unquestioning submission under penalty of death for disobedience, their antagonists did not give them the chance of accepting the alternative of toleration. With them it was a question of absolute submission or brutal suppression.

Moreover, it was not purely a question of religion in the case of many of those who ultimately supported Knox against the Church and the Government. The movement had its political as well as its religious side. Knox himself was a lover of constitutional liberty. In political thought he belonged to the school of John Major. He was the champion of limited monarchy, and held with Major that a king is bound to govern in accordance with the Constitution and the common weal of the realm. Otherwise he is a tyrant, and may justly be deprived of his crown. He held, further, that in a constitutional monarchy the king must govern with the consent of the governed in all weighty affairs of State. "To bridle the fury and rage of princes in free kingdoms and realms it appertains to the nobility, sworn and born counsellors of the same, and also the barons and people, whose votes and consent are to be required in all great and weighty matters of the commonwealth." [65] Sir David Lyndsay proclaims the same doctrine, which also found in Buchanan a staunch supporter, and this

[63] Knox, i. 336; *cf.* 344, 366. [64] *Ibid.*, i. 338.
[65] *Ibid.*, i. 411.

doctrine gained Knox the adhesion of many who might not be convinced by his appeal on purely religious grounds.

Apart from religion, there were some features of the Regent's government and policy fitted to excite the opposition of both nobility and people. The employment of Frenchmen aroused the jealousy of the magnates.[66] The augmentation of the French troops by the steady arrival of reinforcements might well suggest the idea of holding the country in subjection to France and governing it by military force. The burden of maintaining this increasing force was felt to be oppressive in a country that was barely self-supporting. The debasement of the coinage and the intrusion of bad French money were other substantial grievances. There was thus material enough for an indictment of her government and policy. Of this material Knox made skilful use as the spokesman of the opposition, which was ultimately swelled by a considerable accession of the nobility, including the Duke of Chatelherault and his son the Earl of Arran, who had been compelled to flee from France for his profession of the Reformed doctrines, to the ranks of the Lords of the Congregation. In a series of documents, evidently penned by him, they charged her with an attempt to subvert the Constitution and liberties of the kingdom. Had she not called in band after band of French soldiers and fortified Leith without the counsel and consent of Parliament? Had she not, by means of these alien troops, sought to govern the country by terrorist methods and filled the lieges with reasonable apprehension for the security of their lives and property? Had she not sought to wage war on the subject and repress by force the Reformed doctrine in the interest of a corrupt and idolatrous Church? Had she not broken or evaded the conditions of the agreement made with the Lords of the Congregation, which bound her to cease from persecution and give free course to the ministrations of the Reformed preachers? These are the main charges alleged against her régime in order to prove it to be detrimental to the common weal and to justify resistance in defence of religion and liberty.

[66] Buchanan, ii. 387.

On her side the Queen Regent disclaimed any intention of subverting the rights and liberties of the subject or the Constitution and independence of the country. The French troops were necessary for her protection and for the preservation of peace and order against their rebellious subverters. To the charge of treachery to Scotland she retorted with the charge of the treasonable intrigues of the Reform party with England. She accused the Reformed preachers of meddling with politics and bringing by their attacks on the Government her authority into discredit. She averred that the resistance of the Reform party to her policy of repression was only another name for rebellion, and charged them with conspiracy against her authority under the cloak of religion. This party, she told the nobility, "means nothing but a rebellion." [67] She scouted Knox's distinction between authority as God's ordinance and the abuse of it by the person in whom this authority might be vested, and his argument that opposition to such abuse was not rebellion, but fidelity to the common weal.[68] She refused to accept these assurances of obedience to authority rightly exercised as a mere pretext to cover their assumption of the right to decide for themselves how far they would render such obedience.

As between these contending averments, there is something to be said for and against both sides, though the balance seems to be on that of the Reform party. From the religious point of view there was force in Knox's contention, in view of the persecuting policy of the previous thirty years which had only been mitigated for political reasons, that the only course open to this party was to resist force by force. There can be no doubt that the Regent had finally adopted this policy as the only means of maintaining the old Church and its corrupt hierarchy. From the hierarchy it was vain to expect any effective measure of reform. The failure of the resolutions of one Provincial Council after another to this end was indisputable, and reform on Knox's lines they could on no account concede. Their only remedy

[67] Knox, i. 324.

[68] The documents in which these charges and counter-charges are made are given by Knox, i. 363 f.

was in reality the repression of their opponents by the stake, as the recent martyrdom of Walter Myln in April 1558 had shown. The Regent had proved by outlawing the preachers that she was determined to use the power of the State to apply this remedy, and her policy could only be defeated by forcible measures. On the other hand, the violence of the mob at Perth and other places in destroying or stripping churches and monasteries gave colour to the charge that the Reformation was a menace to law and order, and as such must be put down. It must be remembered that the inordinate wealth of the Church was an offence to the people as well as the nobility, and a section of the people at least, as voiced by "The Beggar's Summons," was prepared to take the law into its own hands and despoil the monks of the wealth which they regarded as held for their benefit and most unworthily used. It must be further admitted that Knox, by his inflammable sermons against idolatry at Perth and elsewhere, was not without his share of responsibility for this violence, though he disclaimed any intention of inciting to popular riot, and exerted himself to prevent the destruction of Scone Abbey. He seems to have sincerely desired the establishment of the true faith by constituted authority rather than by mob violence.[69] He distinguished between the action of "the rascal multitude," which he disapproved, and the right of the lords and their associates to resist a tyrannical government on behalf of their religious convictions. This, he held, was not sedition or rebellion, though the fact could not be gainsaid that it did involve resistance to constituted authority. In that case Knox could, however, say with no little force that his opponents by their violence had brought things to this pass, and had left him and his adherents no alternative but to meet force with force. The fact was that it was a case of two antagonistic forces which could not be reconciled or brought to accept a policy of mutual toleration. The attempt to make out that, in seeking to resist and even overthrow the Church, they were not necessarily attacking the State, seems rather questionable in view of the fact

[69] Knox, ii. 349-350.

that the actual Government as representing the State was identified with the Church. It would have been better fairly to recognise the fact and admit that, as things stood, the policy of resistance, even on religious grounds, did involve rebellion against the State.

The case assumes a different aspect when regarded from the political point of view. In spite of Knox's insistence, as against the Regent's accusation of merely using religion as a pretext, that it was for religion only that he and his associates were contending against her, the movement erelong did develop into a struggle for political as well as religious ends. Knox himself came to realise this, though his own interest was first and foremost the religious one. Apart from the fact that a section of the nobility seems to have been actuated by personal motives in their antagonism to the Regent, there was no little reason for resorting to strong action against her Government on political grounds. Political as well as religious liberty was at stake. In the light of the secret intrigues and negotiations with France, it is evident that the Constitution and liberty of the country were exposed to grave danger in the hands of Mary of Lorraine. She was acting under the direction of her brothers, the Duke of Guise and the Cardinal of Lorraine, and their will was really the mainspring of the government of Scotland under her auspices. The policy of ruling Scotland by means of a French army was sufficiently impolitic in principle and oppressive in practice to justify the determined opposition which this policy eventually aroused on the part not only of the Lords of the Congregation, but of others of the nobility who ultimately associated themselves with them. This was an experiment that did not deserve to succeed. Nor could it be successfully applied in the case of a country like Scotland, long accustomed, by means of "bands" or associations for the purpose of personal or party interest, to opposition to the crown.

In this case the opposition involved principles of far-reaching import in both the religious and the political sphere. To realise this it is only necessary to peruse the document in which they gave their reasons for carrying their opposition to the length of depriving the Regent of

her authority. The indictment makes out a strong case on behalf of the contention that the country is being unconstitutionally and tyrannically governed to "the great peril of the common weal and liberty thereof," and "the whole subversion and alteration of the remanent laws of this realm." [70] Before proceeding to this extreme step, the lords formally put the query to Knox and Willock whether a tyrannic ruler might lawfully be deposed. Both answered in the affirmative. Though the office of ruler (magistrate) is by divine ordinance, it is limited by the law of God and the law of the land, and if the ruler transgresses this twofold law and acts contrary to his duty to the subject, he may justly be deprived of his authority by the lords and barons as the natural representatives of the nation.[71] The sentence purported to be given in the name and by the authority of "our sovereign Lord and Lady" (Francis II. and Queen Mary). This was, of course, a fiction in order to give their action a constitutional colour, for these lords and barons would not be esteemed revolutionists. They appeal to ancient laws and liberties, and are only vindicating the old Constitution. They are mediæval and retrospective, aristocratic, not truly democratic as far as the enunciation of principle is concerned, though the phraseology is democratic and the burgh representatives are associated with the nobility in this declaration.

This, then, is the constitutional doctrine relative to the kingship and its exercise evolved in the course of the struggle in behalf of the Reformation movement, which some months later was carried to a successful issue, with the aid of the English army, in the establishment of the Reformed Church by the Convention of Estates in August 1560. It is the old theory of the Constitution which found expression in the schools and also on occasion, implicitly if not explicitly, in certain parliamentary documents, and which Knox and his associates put in practice. It was the theory that was ultimately exemplified against the daughter of the Regent, the ruling sovereign herself, Queen Mary,

[70] Knox, i. 444-448. [71] *Ibid.*, i. 442-443.

in 1567. The Queen Mother as a Frenchwoman, though not without ability and resource, had proved her incapacity to govern Scotland in such a contingency when new forces were at work in shaping the destiny of the country. The French methods of government and the French agents whom she employed were bound in any case to excite an upheaval in a people difficult enough to govern in ordinary times. With the added stimulus of religious sentiment and conviction to augment the difficulties of the task, failure was inevitable. Knox represents Mary of Lorraine as a crafty and imperious personality, and ascribes her failure to her predilection for fraud and force as the indispensable means of government. He shows a bitter animus against her, and his judgment is undoubtedly warped by religious bias. Buchanan is more objective and mentions the opinion of some that, if left to herself, she would have pursued a more moderate policy,[72] and that she acted more as the tool of her brothers, the Guises, and her French councillors, who were determined to govern Scotland on the French model, than in accordance with her own initiative.[73] This is probably nearer the truth, and substantially agrees with the estimate of Bishop Leslie. Leslie, who, unlike Knox, is biased in her favour, also ascribes her failure to her maladroit preference for her French ministers, which alienated the nobility. He frankly admits that this alienation was justified by the absolutist system of government which these ministers strove to introduce to the subversion of the old laws and customs of the land, "which customs and sore charges (taxes) our people, much given to liberty, when first they perceived to be laid upon them, they determined to strike this yoke from their neck." [74]

Unlike her mother, Queen Mary, who from August 1561 assumed the actual government of Scotland, whilst favouring the same Francophile policy and disposed by her French education to favour the French system of government, was gifted with a strong will of her own, tenacity in carrying out her immediate purpose, and no little ability and resource.

[72] "History," ii. 430. [73] *Ibid.*, ii. 430-431.
[74] "History," ii. 442.

Unfortunately, she was largely swayed by impulse and, like her mother, she was more French than Scottish by descent and training. Her essay in government was, in virtue of her personality and the circumstances of the time, destined to end in disaster and tragedy more complete than in the case of any of her predecessors. With her enforced abdication, defeat, and ultimate flight to England, the Stewart kingship seemed to have reached the nadir of discredit and impotence. The Queen had herself largely to blame for this wretched finale of her six years' rule. She was no fanatic in religion. But she naturally preferred her own faith to that of Knox, and insisted on ruling Scotland as a Roman Catholic sovereign. This was certainly an anomaly as things then stood, which required the ruler to profess the religion of the subject whether Roman Catholic or Protestant. True, Scotland was as yet only partially Protestant. But the Estates in their representative capacity had established the Reformed Confession as the religion of the nation, and had made it illegal to recognise or practise the old cult. She ostensibly accepted the situation, and chose as her principal advisers two of the leaders of the Reformation, Lord James and Maitland. But she seems to have cherished the secret policy of a restoration of the old Church, though she could show herself amenable on occasion to the influence of political and personal interest. Both by her refusal to be converted to the Reformed doctrine and her dubious intentions she aroused the distrust of Knox and the more staunch of his followers, and there could, therefore, be nothing but friction and antagonism between her and a large section of her subjects on religious grounds. Knox and his party were unable to see that toleration of her Mass was compatible with fidelity to the Reformation, and in his interviews with her he argued in his usual fashion that Roman Catholicism was idolatry, and demanded her renunciation of it.[75] The Queen could with no little force

[75] In spite of Knox's insistence on the destruction of idolatry and the penalties against it, the Reformed party used their supremacy with remarkable moderation. Leslie is constrained to admit that "at that time they exiled few Catholics on the score of religion, imprisoned fewer, and put none to death." Knox, ii. 463.

adduce in her favour the argument of conscience, which Knox had used with such vehemence on behalf of the Reformation against her mother. For him the Roman Catholic conscience was ill-informed and, therefore, to be disregarded. It was a questionable argument, and the Queen naturally insisted on repelling it as far as she was personally concerned. Nevertheless, it is evident that unless she could succeed in crushing the Reformation, there was little hope of bringing about a Romanist reaction. Such a policy was hardly within the range of possibility.

It is no less evident that her profession of a religion proscribed by the Estates and supported by the large mass of the people, in the Lowlands at least, as well as a powerful section of the nobility, was a very serious obstacle to the success of her rule. It was, to say the least, a perpetual irritant that must ultimately lead to a deadlock in the case of a sovereign who was so much swayed by impulse, so little self-controlled, as the gifted, but wayward, Queen of Scots. In the course of her short reign she perpetrated one imprudence after another in the political sphere, culminating in the enormity of the destruction of Darnley and the marriage with his murderer, Bothwell. Moreover, like her mother and in a more personal degree, she represented the autocratic system of government, the high notion of royal prerogative which obtained in France, and in this respect also could hardly fail to come into collision with her Protestant subjects. Knox left her in no doubt on the point. She ventured to claim in her first interview with him that the people are bound to profess the religion of their prince in virtue of the divine command to obey the powers that be. "Subjects," emphatically returned Knox, with characteristic reasons given, "are not bound to the religion of their princes, albeit they are commanded to give them obedience." Nay, they may resist them if they have the power and occasion arises. "Think ye," asked the Queen, "that subjects, having power, may resist their princes?" "If princes exceed their bounds, madam, there is no doubt that they may be resisted even with power." [76] The Queen

[76] Knox, ii. 281-282.

was dumbfounded by this unspeakable declaration. It was not so that she had learned to conceive of the royal power in the atmosphere of the French Court, though the Reformed party in France was erelong to give a tragic exemplification of it in the civil struggle of the next thirty years. In Scotland it had already been put in practice often enough by a turbulent nobility, and was the fundamental fact of the recent struggle. But in this struggle in behalf of the Reformation it was no mere outburst of aristocratic insubordination. The Reformation had undoubtedly called into activity a new force in the individualism which it nurtured. It had given to the people, as represented by the middle class at least, a new sense of its importance as a factor in the national life and government. With this factor both the crown and the nobility had henceforth to reckon. A new spirit was born in the nation out of the spiritual movement of the previous thirty years, which energised the whole national life and made itself felt in the political as well as the religious sphere. A queen who could not realise this and attempted to rule after the French model would not rule Scotland long without a renewal of civil as well as religious upheaval, and, considering the personality of Mary Stewart, without ultimate disaster.

This disaster came in 1567 when the Bothwell marriage evoked the inevitable rising against her, ending in enforced abdication, though the conduct of some of the aristocratic politicians concerned in it was anything but honest and above criticism. Thus it came to pass that the constitutional theory which was invoked against the Queen Regent came to be invoked against her daughter, Queen Mary. It availed not that the Queen before her capture by the insurgent lords promised to rule henceforth by the advice of the nobility.[77] She was compelled to abdicate in favour of her son, who was crowned king at Stirling in the end of July 1567, and agree to the Regency of James Stewart, now Earl of Moray. In the articles presented to the Parliament in December, the relation between prince and subject is explicitly declared to be of the nature of a

[77] Knox, ii. 557, 562.

contract, and the obligation of the contract is mutual. In the Act of Parliament based thereon the king is held bound by his coronation oath to maintain the Reformed religion, to rule in accordance with the law of God and the laws of the realm, to repress all oppression and wrong, and to preserve justice and equity to all.[78]

[78] "Acts," iii. 23-24; MacKinnon, "History of Modern Liberty," ii. 464-465.

CHAPTER III

GOVERNMENT AND ADMINISTRATION OF JUSTICE

DURING this period the machinery of government becomes more elaborate and complicated in accordance with the development of the State and the necessity of adapting government to the needs of the time. Reforms or alterations in the administration are made or attempted as the occasion arises. New royal officials are created, such as the controller, treasurer, secretary, advocate, in substitution of or addition to existing ones. New administrative bodies, or committees, or courts are called into being, such as the Lords of the Articles, the Lords Auditors of Causes and Complaints, the Privy Council, the Session which ultimately develops into the Court of Session. The reigns of David II., James I., James IV., and James V. are particularly notable in respect of such development in the machinery of government. The first, fourth, and fifth Jameses especially distinguished themselves as Reformers, and even David II. deserves, though in a less personal degree, a place in this category.

The office of Lord Chancellor acquired an enlarged jurisdiction throughout the period. As a rule he presided over the meetings of the Estates [1] in addition to being Keeper of the Great Seal. He was the king's chief legal adviser and his assessor in the courts of justice when he was present in person.[2] He was a member of the Privy Council [3] and the Judicial Committees of Parliament, and, on the institution of the Court of Session by James V., he was empowered to take the place of the President.[4] During

[1] Rait, "The Scottish Parliament," 36.
[2] Cosmo Innes, "Scotch Legal Antiquities," 76.
[3] By an Act of James IV., he must be a member. "Acts," ii. 220.
[4] Mackay, "Practice of the Court of Session," 5.

the period he occasionally emerges as a leading member of the Government as well as the judicial administration, though the office was sometimes filled by rather obscure or mediocre officials. Its occupant continued till nearly the end of it to be frequently a churchman. Of the thirty-four chancellors from the reign of Robert I. to the commencement of that of Queen Mary, eighteen, or fully more than one-half, were ecclesiastics, and among them were men of outstanding competence such as John Cameron, Bishop of Glasgow in the reign of James I.; James Kennedy of St Andrews in that of James II.; William Elphinstone of Aberdeen under James IV.; Gavin Dunbar, Archbishop of Glasgow under James V.; and Cardinal Beaton during the first years of the minority of Mary. Beaton was the last but one of these clerical chancellors, the long list of them being completed by John Spottiswood, Archbishop of St Andrews and Chancellor for a few years in the reign of Charles I.[5] Some of the lay chancellors were not only men of high rank, but also played a prominent part in the political history of their time: Sir William Crichton, for instance, in the reign of James II.; the Earls of Angus, Argyll, and Huntly in that of James IV.; another Angus during the early part of that of James V.; and the Earls of Huntly and Morton in Queen Mary's reign.[6]

Unlike the Chancellor, the Lord Chamberlain declined considerably in importance in virtue of the administrative reforms of James I. He ceased to be the receiver and dispenser of the royal revenue, retaining only his judicial duties as President of the Court of the Four Burghs, and continuing to hold his ayres or courts. In these he heard appeals from the burghs, and these were tried in the Court of the Four Burghs before a jury composed of their representatives.[7] His right to hear these appeals lapsed with the establishment of the Court of Session in 1532. His place as receiver and dispenser of the revenue was taken from James I.'s time by the Treasurer and the

[5] Crawford, "Officers of the Crown in Scotland," i. 177.

[6] Lists of the chancellors, with accounts of them, are in Crawford and in Cowan's "Lord Chancellors of Scotland."

[7] Maitland Thomson, "Public Records of Scotland," 137.

Controller. To the former officer were assigned the collection and disbursement of the feudal dues received from the king's vassals, and the fines and other moneys of the courts of the justiciar, sheriffs, stewards, and bailies, and the proceeds of special taxes and contributions. To the latter that of the rents of the crown lands, burgh mails, and customs.[8] Whilst the Controller disbursed the expenses of the household and the cost of holding the annual audit of the Exchequer out of the revenue received by him, the Treasurer was responsible for the provision of the expenditure of the State, including the miscellaneous expenses of the king, queen, and those of the royal family not otherwise provided for, the liveries of the king's officers and servants,[9] the upkeep of the royal stables and the royal castles, the provision of artillery and munitions for the army, the maintenance of the king's ambassadors and the lodging and entertainment of foreign ambassadors, the payment of pensions, etc. Ultimately he became a high officer of State, and after the offices of Treasurer and Controller were combined in the reign of James VI. he took precedence after the Chancellor.[10] The tenure of the office varied. It might be conferred for a specified number of years, or during the king's pleasure, or for life. As in the case of the Chancellor, it was frequently held up to the middle of the sixteenth century by a churchman.[11]

The Lords Auditors of the Exchequer, whose number varied from seven to fifteen and sometimes more, usually included several officers of State along with the Treasurer and Controller, and continued to hold the annual audit of the Exchequer accounts at different places, wherever the king happened to be residing.[12] The Clerk of Prebend seems to have been replaced by the Clerk of Audit (*Clericus Proba-*

[8] "Accounts of the Lord High Treasurer," i. Preface, 13-15.

[9] For the names and duties of these, see "Accounts of the Treasurer," ii. Preface, 188 f.

[10] *Ibid.*, i. Preface, 22-25.

[11] *Ibid.*, i. Preface, 28 f.

[12] "Exchequer Rolls," i. *passim* and subsequent vols. See also "Accounts of the Lord High Treasurer," i. *passim* and subsequent vols. The Lords Auditors of the Exchequer also constituted a court of judicature in causes relating to the revenue.

tionis) of the household expenses, who appears among the Lords Auditors in the reigns of Robert I., David II., and Robert II.[13] Archdeacon Barbour, the rhymer of the life of Bruce, for instance, appears as Clerk of Audit in the king's household in 1372 and as one of the Auditors of Exchequer in the following year.[14] The Clerk of Liverance, another fiscal official, also survives into this period.[15]

The Steward disappeared in James I.'s reign, his place being taken by the Master of the Household, who had under his charge the domestic expenses and the furniture of the king's house, and whose office ultimately became hereditary in the family of Argyll.[16] The office of Constable also became hereditary in the Errol family, but while retaining his jurisdiction over offences committed within the verge of the court and being responsible for the guard of the Parliament House when Parliament was sitting,[17] the Constable, like the Mareschal, tended to become a mere dignitary of State.[18]

The creation of the office of Keeper of the Privy Seal is erroneously ascribed to James I. This functionary is explicitly mentioned under this title in the reign of Robert II.,[19] whilst previous to this time he seems to have been one of the king's clerks. In James's reign Bishop Cameron of Glasgow appears as Keeper[20] as well as Chancellor and Secretary, but in the reign of James II. the office is held by a separate official with the distinctive title of Keeper, who became one of the great officers of State.[21] The Privy Seal was used as a check on the Great Seal, and its use for this purpose is traceable from the thirteenth century. As a check on the Privy Seal the Signet seems to have come into use in the fifteenth century,

[13] Maitland Thomson, 22. [14] Skeat, "The Bruce," i. Preface, 33.

[15] See "Exchequer Rolls," i. 52, ii. 459 (Clericus Liberacionis Domus Regis).

[16] Maitland Thomson, 84. [17] *Ibid.*, 52.

[18] Cosmo Innes, "Scotch Legal Antiquities," 75.

[19] "Exchequer Rolls," ii. 385; "Acts of Parliament," i. 547.

[20] *Ibid.*, iv. 383, 405, etc.

[21] Maitland Thomson, 66. The first volume of the "Register of the Privy Seal" begins in 1488 and appeared in 1908, ed. by Livingstone.

and its charge was assigned to the king's Secretary. The Privy Seal was also used to authenticate a variety of documents without the attachment of the Great Seal. "The Privy Seal alone," says Mr Livingstone, the editor of the first volume of the Register, "was necessary to the authentication of various classes of crown letters or grants, such as gifts of pensions, of feudal casualties, of escheats and other movable property or rights, tacks of crown lands, letters of protection, commissions to minor offices of Court or State, presentations to benefices and many others. The warrant for the attachment of the Seal in these cases was a letter under the sign manual of the sovereign directed to the Keeper of the Seal. . . . To the completion of other crown grants, such as charters or other investitures in crown lands, remissions, legitimations, and various letters patent, the attachment of the Great Seal was required, and the Privy Seal was applied to a precept which was merely a step in the process of procuring the Great Seal." [22]

In the fifteenth century another important officer of State emerges in the Lord Clerk Register, whose office developed out of that of the Clerk of the Rolls, who in the earlier period was the custodian of the documents issued from the offices of the Chancellor and the Chamberlain. In the reign of Robert II. he appears as the Clerk of the Rolls and the Register, the former apparently now denoting the Rolls or Records of Parliament, the latter the Register of the Great Seal, consisting of charters, letters patent (public declarations of the king), and letters close [23] (private instructions to individuals). In James II.'s reign he becomes the Clerk of the Rolls, Register, and King's Council, and ultimately of the Court of Session, whose clerks acted as his deputies. By the beginning of the sixteenth century he thus held a position of importance as an official of the Parliament, Privy Council, and the Supreme Court of Justice, and from this century onwards his importance was augmented by the control of the Registers of the Notaries Public and of Hornings and Inhibitions (outlawries and

[22] "Register of the Privy Seal," i. Preface, 7.
[23] Maitland Thomson, 54.

letters to inhibit debtors disposing of their goods and possessions).[24]

The king's Secretary also gradually became an influential officer of State. He appears for the first time under this title in the reign of David II.,[25] and recurs in those of Robert II. and III. During the fourteenth century and in James I.'s reign he was also Keeper of the Privy Seal.[26] John Cameron, for instance, as has been noted, was Secretary and Keeper under James before he became Bishop of Glasgow and Chancellor. Towards the middle of the fifteenth century he appears as a separate official who was also Keeper of the Signet, or king's personal seal.[27] In the reign of James IV. the office was held by Patrick Panter, a distinguished humanist, and, under James V., by his nephew David, also a classical scholar and ultimately Bishop of Ross, as is evident from the royal missives written by them, of which a series was later published by Thomas Ruddimann.[28] In virtue of his close association with the king in the conduct of business of State, his office tended to become one of great influence in the shaping of policy and the carrying out of important transactions. His influence was enhanced by the fact that he sometimes acted as ambassador to foreign rulers, and took an active part in the negotiation of treaties and other important matters of State. Both Patrick and David Panter, for instance, were sent on embassies to the Court of France, and in Queen Mary's reign Maitland of Lethington figures prominently in the State papers of the period as Ambassador to Queen Elizabeth. The mention of Maitland's name is sufficient to remind us of the eminence and influence which the Secretary ultimately attained as principal Minister of State.

The office of King's Advocate—the public prosecutor and counsel in crown pleas—is another creation of this period. The first recorded appearance of this functionary

[24] Maitland Thomson, 23-24, 46-47.

[25] "Exchequer Rolls," ii. 119, etc.

[26] *Ibid.*, 385.

[27] Maitland Thomson, 65.

[28] See the notices of them prefaced to his edition of the letters, and, on Patrick Panter, C. M. MacDonald's article in *Scottish Hist. Rev.*, October 1916.

occurs in the reign of James III. in the person of Sir John Ross of Montgrenan.[29] The office probably goes back to an earlier period, but it does not occupy a prominent place in legal record before the early sixteenth century. After Flodden it was held by James Wishart of Pitarrow, father of George Wishart the martyr, whose successor was Sir Adam Otterburn, King's Advocate during the greater part of the active reign of James V.[30] He was more prominent as a diplomatist and a politician than as law officer of the crown, and with him began the practice of making the Advocate a judge of the Court of Session, in order apparently to increase the royal influence over this tribunal. He was, in fact, nominated as one of the first fifteen members of the new tribunal. "Otterburn," says Omond, "was called on to combine the duties of a Lord of Session with those of the King's Advocate, and took his seat on the bench at the first meeting of the Court. The plan of making the Advocate a judge, or giving the office of Advocate to one who was already on the bench, continued in frequent use till the latter part of the eighteenth century, and was regarded as a legitimate mode of increasing the power of the crown. The King's Advocate then occupied a position of peculiar importance. He sat on the bench as a judge, and he pleaded as an advocate both for private clients and as counsel for the king." [31] The importance of the office was enhanced under his successor, Henry Lauder, who was made a member of the Privy Council, and in an Act of Parliament of 1540 ranks among the great officers of State.[32] Some years later his right to be a member of the Privy Council *ex officio* is recognised along with that of the Treasurer, Secretary, Controller, Clerk of Council, and Justice-Clerk.[33] Lauder was in office along with a colleague, John Spens of Condie, throughout the crucial years of the struggle to establish the Reformation. Spens was an ardent Reformer, and though he acted as Knox's accuser at the Privy Council before which the great

[29] Pitcairn, "Criminal Trials," i. 8; Omond, "The Lord Advocates," i. 1-3.

[30] Omond, i. 8 f.

[31] *Ibid.*, 15.

[32] "Acts," ii. 355, 368.

[33] Omond, i. 23.

Reformer was tried in 1563 on a charge of "leasing making" (unlawful convocating the queen's lieges), he was but a lukewarm actor in the proceedings, and had the satisfaction of seeing Knox acquitted by the assembled councillors in spite of the queen's keenness to have him convicted.[34]

With the exception of the Constable, the Mareschal, the Controller, and the Advocate, these officials constituted the chief officers of State at the beginning of the reign of James IV. According to an Act of Parliament of 1490, the Chancellor, the Master of the Household, the Chamberlain, the Keeper of the Privy Seal, the Secretary, Treasurer, and Clerk Register are adjoined to the lords spiritual and temporal chosen to form the Secret, later the Privy Council of the king.[35]

The Secret Council, thus organised, was endowed with wide executive powers. It was what we might term the Government for the time being, by whose advice the king acts "in all matters concerning his majesty and the realm." As we have noted, it was organised as the fruit of the violent reaction against the unpopular Government of James III. It was "responsible and accusable" to the king and the Estates, and as if to emphasise this responsibility it is significant that on the occasion of its establishment its members were chosen in the Parliament then in session. It was by no means an entirely new creation, though its composition and powers were now more distinctly defined. The King's Council in the sense of a small executive body, in contrast to the larger Council of the king's immediate vassals, goes back, as we have seen, to the early feudal period. This Council appears to have continued to function from the War of Independence onwards after the Great Council had become the Parliament, the designation applied to the regular meetings of the Three Estates. We have evidence of its existence under the name of the Secret Council in the reign of Robert II. In this reign (1371) the question of the succession of the children of Robert and his first wife was debated in the King's Secret Council

[34] Knox, "History," ii. 401 f.

[35] "Acts," ii. 220.

(*in suo secreto consilio*) before being submitted to the Parliament.[36] In that of Robert III. the Estates, in 1398, in view of the incapacity of the king, appoint a Council to carry on the Government, along with the Duke of Rothesay as his father's lieutenant. The term Secret is not applied to this body, and its function was only temporary. But it is at all events distinguished from the Parliament, and the Estates, as later in 1490, were careful to make its members responsible to them for their executive acts and the maintenance of the laws, under penalty of punishment "as the cause requires."[37]

The King's Council appears in existence throughout the fifteenth century,[38] and, as noted, emerges towards the end of it, in the full light of the detailed enactment of 1490. With its administrative duties it combined from the fourteenth century onwards the judicial function, as appears from an Act of Parliament at the beginning of James I.'s reign (1425). In this Act the king, with the consent of Parliament, appoints the Chancellor and certain discreet persons to be chosen by him from members of the Estates to sit henceforth three times in the year wherever the king may be residing, and hear and decide "all complaints, causes, and quarrels" with which the King's Council was competent to deal[39] ("such cases as might be determined before the King's Council"). The Council had thus hitherto exercised the judicial as well as the administrative function, and this Committee, whilst not superseding the Council as a judicial body, was evidently instituted in order to give effect to James's policy of increasing the efficiency of the administration of justice as far as it was in the hands of the Council, and also, as Professor Hannay thinks,[40] to deal with the embarrassing resort of litigants to the Council instead of to the ordinary judges. The Committee was the origin of what was known as "the Session," whose members were termed Lords of Session, and which was subsequently, in

[36] "Acts," i. 546-547.

[37] *Ibid.*, i. 572-573.

[38] See, for instance, "Accounts of the Lord High Treasurer," i. 1, 166.

[39] "Acts," ii. 11.

[40] Antecedents of the College of Justice, "Book of the Old Edinburgh Club," xi. 89-90.

the reign of James V., merged in the Court of Session. Though at first sitting only intermittently, it became a permanent institution, whose composition and jurisdiction were defined in detail in an Act of 1457. By this Act its powers were limited to actions relative to movable, as distinct from heritable, property, to "spulzie" or spoliation, contracts, debts, tacks, or leases, and other civil actions. The procedure to be observed is also defined, the sheriff of the shire in which the Session was to be held being enjoined to give three months' notice throughout the shire of the day and place of meeting. The suitor shall "pass to the king's chapel (chancery) forty days" before the appointed date and "call his party before the Lords of Session." The party so summoned is bound to answer within fifteen days, and the judgment of the Court is final. "All causes pertaining to the said Lords' knowledge shall be utterly decided and determined by them without any remeid of appellation to the king or to the Parliament." [41] That it did not entirely supersede the judicial activity of the Council appears from the fact that in an Act of 1467 "all causes left undecided in this Parliament shall be decided before the Lords of Council," [42] and that the administration of justice is recognised as within the Council's sphere in the Act of 1490 reorganising and defining its jurisdiction. One of the motives of this reorganisation would, indeed, seem to have been the necessity of reforming the abuses of this administration prevalent in the reign of James III. This appears still more distinctly in a later Act of James IV. in 1504, decreeing that there shall be a Council (evidently a branch or committee of the Privy Council) known as the Daily Council, chosen by the king "to sit continually in Edinburgh, or where the king shall be residing, and decide all manner of summonses and civil matters, complaints, and causes daily when they shall occur." The reason given for this innovation is the pressure of work in the Session and the grievances of the people on the score of the delays in dealing with suits—in the words of the Act—"that there shall not be so great confusion of

[41] "Acts," ii. 47-48.

[42] *Ibid.*, ii. 88.

summonses to call at the Session." [43] Even after the establishment of the Court of Session the Privy Council retained its judicial jurisdiction and exercised its right to decide whether a particular case should be dealt with by it, or by the Supreme Court, to interpose if, in its judgment, justice had not been done, and to try cases of sedition and other offences against the peace of the realm. "It assumes," as Mr Hill Burton phrases it, "if not a right of instruction or command over the Court of Session, yet a position of relative superiority." [44]

Parliament also concerned itself with the administration of justice as well as legislation. It is in fact expressly referred to in an Act of 1399 as a court of law in which justice is dispensed to the king's subjects.[45] A large proportion of its Acts deal, for instance, with offences against the peace, forfeitures for treason, and other judicial matters. So distinctive was this side of its activity that it instituted a special Committee which came to be known as the Lords Auditors of Causes and Complaints, to dispense justice or report to it as its representative. The existence of such a Committee is apparent as early as the reign of David II. In 1341 the Bishop of Brechin and Lord Alexander Seton were appointed as auditors to hear and decide certain causes with which the Parliament had been unable to deal.[46] From the terms of their appointment it is evident that such a Committee was already an established institution.[47] It reappears towards the end of David II.'s reign, when in 1369 a Committee was elected by Parliament to hear appeals in certain disputed judgments or dooms, though in this instance it was not finally to decide these causes, but report for the decision of Parliament on the day before its last sitting.[48] In the Parliament of the following year the appointment was renewed in the same terms, and henceforth

[43] "Acts," ii. 241; *cf.* 249.

[44] "Register of the Privy Council," Introduction, i. 13.

[45] "Acts," i. 573.

[46] *Ibid.*, i. 513.

[47] Auditores deputati ex parte Domini nostri Regis et Parliamenti ad audiendum et terminandum supplicationes et querelas quæ in Parliamento non fuerant terminatæ.

[48] "Acts," i. 506-507.

it seems to have become an established institution. Though its actual election is not again officially recorded till 1467, it is referred to in various Acts in this interval. In one of 1427, for instance, ordaining that those elected in any future Parliament to decide causes and complaints shall take an oath on the Gospels to do justice faithfully and judicially without favour, fraud, or other unworthy motive.[49] In the second half of this century their election is more frequently mentioned, and it was not till 1504, when their duties were assigned to the Committee of the Privy Council instituted in the year to sit continually at Edinburgh or wherever the king should be residing,[50] that it came to an end. The Court thus substituted carried on the work of the Lords Auditors till it, in turn, gave place to the Court of Session, which thus became the final development of the original judicial Committee of the Estates. Throughout the fifteenth century they seem to have been a different body from the Session, which was originally at least a Committee of the Council, not of the Estates,[51] though this designation is also applied to their meetings.[52] Unlike the Session, whose powers, as we have noted, were restricted, their jurisdiction as representing the Parliament was unlimited. During this period "they had," in the words of the editor of vol. ii. of the "Acta Dominorum Concilii," "served the highest judicial purpose from the time of David II." [53]

It should be pointed out in passing that the judicial bodies above mentioned did not always act separately. Lords of Council, Lords Auditors, Lords of Session, and even the Lords of Articles (to be noticed in due course) frequently appear as sitting together in the same Court or Council to dispense justice. They seem, in fact, to have

[49] "Acts," ii. 14; *cf.* 77 (1457). [50] *Ibid.*, 241.

[51] The Estates are later found nominating the members of the Session. See Hannay, "Antecedents of the College of Justice," 92.

[52] *Ibid.*, 77.

[53] Introduction to "Acta," ii. 27. The Acts of the Lords Auditors from 1466-94 were published in 1839 under the editorship of Mr T. Thomson, Depute Clerk Register. Mr Neilson has shown that the Lords Auditors corresponded to similar functionaries in England and France. Introduction, 28.

exercised at times a concurrent and even a conjoined jurisdiction. To them, whether acting conjointly, or singly, is due not a little of the merit of building up a system of Scots law—"the common law of the kingdom" as it was styled in the fourteenth century. In the fifteenth came the gradual introduction of Roman law which became a distinctive moulding influence in the sixteenth and seventeenth centuries. The Canon law had from a much earlier period prevailed in the ecclesiastical courts, and as a considerable proportion of those on whom the administration of justice in the various parliamentary and conciliar committees devolved were churchmen, its influence also made itself felt in this way in the development of the common law.

It was from the judicial committees of Parliament and Council that the Court of Session was finally evolved by James V. in 1532. The new Court thus combined the judicial functions of Parliament and Privy Council, without, as we have already noted, entirely abrogating that of the Council. Its proceedings were accordingly termed the Acts of the Lords of Council and Session, though Professor Hannay has pointed out that this double designation goes back to 1490.[54] The motive of its institution was the increasing difficulty of the regular dispensation of justice owing to the commotions of the minority of James V. and the widespread grievances arising therefrom. An efficiently organised system had become a clamant necessity. Even in James IV.'s reign, in spite of repeated attempts, by various expedients, to deal with the arrears of business, the old system of judicial committees of Parliament and Council was proving entirely inadequate.[55] It was this state of things, which evoked dissatisfaction in all ranks of the people, that at last forced the king and his advisers after his advent to the actual government, to essay an effective remedy in the form of the institution of a unified court, known as the College of Justice for the whole country. This attempt was already taking shape in 1526 when certain persons (five ecclesiastics and four lords) were adjoined with the

[54] "Antecedents," 101.

[55] On this subject see Hannay, "Antecedents," 102 f.

lords of the Secret Council and the king's chief ministers to sit upon the Session as a special court for the expedition of civil cases. In the following year its membership was elaborated, the Archbishop of Glasgow being appointed its president, and its procedure particularised. They are, for instance, to make a regular "table" of the cases to be tried and to observe it, to permit entrance to none except the judges, parties, and their advocates to the Council house, without licence of the president, and to pay no heed to even the royal letters obtained of the king by importunate solicitations in favour of any particular suitors, "his highness promising that he shall give no letters to stop justice, but only to further it always." The Court continued to be appointed during the next four years, and in 1531 the king dispatched his secretary, Erskine of Haltoun, to Rome to obtain the consent of Pope Clement VII. to a contribution to be levied on the Scottish prelates for the institution of a College of Justice. The result was a papal Bull, of date 13th September 1531, narrating the desire of the king to establish such a college, and imposing a subsidy of 10,000 ducats, equivalent to £10,000 Scots, on the Scottish Church for its maintenance.[56]

The credit for the first step in the elaboration of a supreme endowed court of justice seems to belong to the Chancellor, Gavin Dunbar, Archbishop of Glasgow, and the Duke of Albany who, though absent in France, maintained an interest in Scottish affairs, as well as to the young king himself.[57] The preamble of the Act of Institution, which was drawn up by the Lords of the Articles, adduces as its motive the desire of the king "to have a permanent order of justice for the universal weal of all his lieges."[58] It specifies the terms—four in number—of its sittings throughout the year, and ordains that the members of the Court shall be sworn to administer justice equally to all persons in such causes as shall come before them, with such other rules and statutes as shall please the king's grace to give them for ordering of the same. Thereafter follows the enactment

[56] For these preliminary steps see Hannay, "Antecedents," 112 f.
[57] Mackay, "Practice of the Court of Session," 1-2.
[58] "Acts," ii. 335.

itself as passed by the Three Estates on the 17th May 1532. "The Three Estates of this present Parliament think this article well conceived. And therefore the king's grace, with advice and consent of the said Three Estates, ordains the same to have effect in all points, and now ratifies and confirms the same. And has chosen these persons underwritten to the effect foresaid whose process, sentences, and decreets shall have the same strength, force, and effect as the decreets of the Lords of Session had in all times bygone. Providing always that my Lord Chancellor, being present in this town or other place, shall have vote and be principal of the said Council, and such other lords as shall please the king's grace to join to them of his great Council to have vote to the number of three or four." [59]

The Court thus instituted was inaugurated by the king in person on the 27th May 1532. Its membership, half cleric and half lay, retained the ecclesiastical element in the administration of justice, characteristic of the old judicial committees, till the Reformation. Though the king had professed his anxiety to render the judges independent of royal interference, and even enjoined them not to obey directions to the contrary, the proviso in the Act of Institution empowering him to adjoin certain other lords to the fourteen Senators of justice, as the regular members were termed, left the crown the power of encroaching on the independence of the Court on occasion by means of these Extraordinary Lords. This proved a serious drawback from the point of view of impartial justice, though the Act by establishing a centralised and endowed Supreme Court in civil causes was a great reform in itself. The complaints over the miscarriage of justice, rife enough in previous reigns (as voiced, for instance, by the anonymous poet in the "Book of Pluscarden" in the latter half of the fifteenth century), are repeated by another and greater poet in the first half of the sixteenth. Sir David Lyndsay found matter enough in these abuses for his satiric muse, and his strictures of the misdoings of "the men of law" find confirmation in those of Buchanan and other contemporary historians. "Thou

[59] "Acts," ii. 336.

art the daftest fool that e'er I saw," quoth Diligence in the "Satire of the Three Estates," to the poor man who would seek a man of law to help him to get justice of the priest. "Trous thou, man, of the law to get remeid of men of Kirk? No, nocht till thou be deid."

The Act of 1532 was ratified two years later by the pope in respect particularly of the endowments derived from ecclesiastical sources, and by the king generally in 1540 (on attaining his majority at the age of twenty-five), with the addition of the power, reserved in the previous Act to the king, to the President and Senators to make such regulations as should be expedient for the efficient administration of justice. This ratification is the final step in the tendency to separate the judicial from the legislative function with which it had hitherto been so closely associated through the Lords Auditors. It also tended to concentrate in the hands of an endowed body of king's judges the administration of justice in civil causes, and thus to curtail, if not entirely to supersede, the complex jurisdictions of the old feudal system.

Till quite recently the historians,[60] following Sir George MacKenzie, have asserted that the Court of Session was modelled on the Parliament of Paris. The assertion seems to be unfounded. The Supreme Court of Scotland is the final development of the administration of justice by committees of Parliament and Council during the previous two centuries. There was no definite imitation of any foreign institution. There is at most only an analogy between the creation of James V. and the Paris Parliament. The assertion seems to be based originally on a misinterpretation of a statement of David Chalmer in the second half of the sixteenth century. "Chalmer," says Professor Hannay, "who was personally acquainted with the work of the Session, did not represent James V. or even his father as copying the Parliament of Paris. He drew attention to an analogy between two institutions which arose, to use modern language, out of differentiation of function in the *Curia Regis*." [61]

[60] Mackay, for instance, in "Procedure of the Court of Session," 19 f.
[61] "Antecedents," 87-88.

The jurisdiction of the Court of Session did not extend to criminal causes, though in certain cases such jurisdiction was conferred on it by later special statutes. This came within the province of the ordinary judges [62]—the justiciar, the chamberlain, the sheriff, the provost and bailies of burghs, and also the lords of regality and barony and the higher ecclesiastics, who had their own courts. These various courts took cognisance of civil as well as criminal causes, and, as we have seen, the ordinary judges could alone deal with questions affecting heritable rights which were excluded from the jurisdiction of the Session.

The ordinary judicature—justiciar, sheriff, and lesser judges—had been established in the early feudal period. It continued to exist in substantially the same form throughout the fourteenth and fifteenth and into the sixteenth centuries. The only material development was in the direction of making the office of judge—notably that of the sheriff—hereditary, which Robert I. initiated and his successors continued,[63] until in the sixteenth century nearly every sheriffship was held in fee and heritage. Before the establishment of the Court of Session in 1532, Reform was concerned with the introduction of special courts—the judicial committees of Parliament and Council—in order to cope with the overpressure or the neglect of business in the ordinary courts, and also to hear appeals from the ordinary judges.

As in the early feudal period, the king himself retains and exercises the prerogative to judge in person. From David II. to James V. there are numerous enactments relative to this essential of the royal functions. David is, for instance, by the ordinance and consent of the Estates, to hold his justice circuit (*iter justiciarium*) throughout the whole kingdom in order that justice may be more fully executed by the royal authority to the terror of evil-doers.[64]

[62] The various ordinary judges are often referred to in the "Acts of Parliament" from David II. onwards, i. 492.

[63] These hereditary offices are already mentioned in the reign of David II., Hujus modi officiis infeodati, "Acts," i. 492, 509, and are noticed in the Acts of subsequent reigns. See, for instance, i. 550, 556.

[64] "Acts," i. 492.

On these occasions the king sits *pro tribunali* and delivers sentence himself, or by the mouth of his deemster after the judges have reported on the case in question.[65] Similarly, by resolution of the Estates, James II. is "to ride throughout the realm" to supervise the administration of justice and to be present at the justice ayres or courts.[66] Again, in the reign of James IV., the king is to ride "in proper person" to all his ayres accompanied by the justiciar,[67] and in case this may not be expedient, he is to send such persons with the justiciar as shall be necessary for the effective administration of justice.[68] In 1526 the Estates are still found ordaining that "our sovereign lord (James V.) be personally present at the holding of the justice ayres."[69]

As in the early feudal period, the country is still divided into the two regions north and south of the Forth for the purpose of the administration of justice. Each region had its justiciar and other judges. In David's reign, for instance, mention is made of "our justiciar on the northern side of the sea of Scotland," *i.e.*, the Forth.[70] Robert II. commits the office of justiciar "on the northern side of the water of Forth" to his son Alexander, whom the sheriffs accuse before him and the Council of the maladministration of his office.[71] The distinction reappears in the reign of James I. in an Act referring to the jurisdiction of the justiciar and the sheriffs on both sides of the Forth.[72] It recurs in Acts of James II., III., IV., and V., relative to the holding of justice courts by the justiciars of the north and the south side of the Scottish sea respectively.[73] The old practice of holding the justice ayres (circuit courts) twice in the year—"once on the grass (spring) and once on

[65] "Acts," i. 509. Dr Neilson draws a comparison between this and the *Lit. de Justice* of the French Parlément in which the king appeared personally to deliver his decision. He thinks that it was an importation from France. "Acts of the Lords of Council," ii. Introduction, 51-52.

[66] *Ibid.*, ii. 33.

[67] *Ibid.*, ii. 208.

[68] *Ibid.*, ii. 225.

[69] *Ibid.*, ii. 315.

[70] *Ibid.*, i. 526.

[71] *Ibid.*, i. 556.

[72] *Ibid.*, ii. 24.

[73] *Ibid.*, ii. 176, 177, 183, 294, 315; "Acts of Lords of Council," ii. 338.

the corn" (autumn) in the old phrase—also survived throughout the period,[74] all free-holders within the shire being bound to attend and assist the justiciar in the performance of his office.

In accordance with this twofold division it would appear that, as in the earlier period, there was a chief justiciar for each region. In the reign of James III. it was found necessary, in view of the rampant lawlessness, to duplicate them in both regions under the distinctive title of justices-general or great justices,[75] and to send with them certain lords and persons of the King's Council as their assessors. Under James IV. the same expedient was resorted to in 1503, and the office of justice depute and several new sheriffships were instituted for the more effective administration of justice in the Highlands.[76] By the middle of James V.'s reign the office of justice-general seems to have been exercised by one official under this title and his deputes. An Act passed in 1526, directing that justice ayres be holden universally throughout the realm "discharges all commissions of justiciary granted and given to whatever persons within the realm, so that all causes criminal which are to be decided before our sovereign justice have passage before him and his deputes and none otherwise."[77]

According to Maitland Thomson, the office of justiciar was not hereditary. "Hereditary justiciars we had none so far as is known, but the office may sometimes have been granted as a fief."[78] This is true only of the period before the sixteenth century, when, as Hume has pointed out, the office became hereditary in the family of Argyll. In the early part of the sixteenth century the earl appears as holding the office in fee and perpetuity, and continued to hold it until he resigned it into the hands of Charles I. in 1628, reserving only his rights

[74] "Acts," ii. 33, 35, 170, 225.

[75] *Ibid.*, ii. 176, 182.

[76] *Ibid.*, ii. 241-242.

[77] "Acts," ii. 315. In this Act an exception is made in favour of the Earl of Moray, the earl being declared to be justice-general within the limits of his lieutenancy, with all the profits granted to him in his commission.

[78] "Public Records," 137.

as justice-general for the sheriffships of Argyll, Tarbert, and the Isles.[79]

The institution of the Court of Session deprived the justiciar or justice-general and his deputes of their civil jurisdiction. Otherwise the old system remained in force, though it was very imperfectly applied in the reign of Queen Mary and that of her son, James VI. In consequence of the irregularity of the holding of justice ayres, Parliament in 1587 found it necessary to enact once more that these courts should be regularly held by the justice-general and his deputes, commissioned for this purpose. Nearly a century elapsed before it finally gave place to a High Court of Justiciary, in virtue of the Act of 1672, which abolished the office of justice depute and created a court consisting of five judges of the Court of Session, along with the justice-general and the justice-clerk, for the trial of criminal causes in the capital, with ayres or courts for particular districts of the country.

The old system thus abolished certainly had its imperfections, to judge from the numerous attempts of Parliament throughout the period to remedy them. These attempts form one of the most characteristic features of its enactments from David II. to James VI. Whilst they afford evidence of the attention bestowed by Parliament under strong and weak rulers alike on the administration of justice, they also show the difficulty of applying the law during these centuries, when parliamentary enactments in behalf of good government were often little more than pious aspirations. The fact that the judges held their office largely by hereditary right lent itself to the arbitrary or remiss discharge of its duties. Hence the tendency of litigants to bring their suits before the committees of Parliament and Council, instead of before the ordinaries. This was one of the grievances that engaged the attention of James I., who found it necessary to direct that causes

[79] "Commentaries on the (Criminal) Law of Scotland," i. 7. Mr Maitland Thomson points out that there were justiciars of fee from an early time, but that it was quite possible to hold an office in fee without holding it in heritage. See "A Roll of the Scottish Parliament, 1344," in *Scottish Hist. Rev.*, vol. ix. (1912).

affecting the common profit of the realm should not be determined by Parliament, but by the ordinary courts of the justiciar, chamberlain, sheriffs, bailies of burghs, barons, or ecclesiastics, and that these judges should dispense impartial justice under threat of exemplary punishment by the king.[80] This tendency to have recourse to the royal justice seems, in fact, to have led to the establishment of the special court known as the Session in the following year.[81] The grievance is again apparent in the reign of James III., under whose auspices the administration of justice was notoriously remiss. In 1469 we hear of "sheriffs and other judges ordinary who will not exercise their office and minister justice to the poor people." Another remedial Act ordains that litigants shall have recourse to the ordinary judges, and if justice is duly executed "they shall remain content." If not, they may complain to the king and summon the defaulting judge before him and his Council, by whom, if the complaint is well founded, he shall be suspended or deprived of his office.[82] The Act does not seem to have been very effective, for five years later it was deemed necessary to re-enact it, if only to avert the pressure of litigants applying for the royal justice. They are directed to have recourse to their ordinary judge, and "vex nocht our sovereign lord and his Council with their complaints," unless in clear cases where justice has not been done according to law.[83] Again, evidently without effect, as the subsequent renewal of the Act and numerous others relative to the lack of justice and the rampant lawlessness of the reign show.[84] In the early part of the reign of James IV., what is rather incorrectly known as the Education Act of 1496, directing the eldest sons of barons and free-holders of substance to be sent to the schools and thereafter to the universities to be trained in arts and laws, was passed with a view to the proper training of those who should become sheriffs or judges ordinary. The reason adduced for this so-called scholastic measure is significant of the incapacity and neglect of these officials—"so that

[80] "Acts," ii. 8.
[81] See Hannay, "Antecedents," 90.
[82] "Acts," ii. 94.
[83] *Ibid.*, ii. 107.
[84] *Ibid.*, ii. 111, 122, 165, 170, 176, 182.

the poor people should have no need to seek our sovereign lord's principal auditors for every small injury." [85] This Reform Act could, however, have no immediate effect, and it was to meet the pressure of suitors at the Session, whereby "poor folks have been delayed and deferred from year to year and have wanted justice," that a new Court (the Daily Council) was, as we have noted, instituted in 1503.[86]

Another expedient for dealing with this maladministration was the inquisition occasionally directed by Parliament into the conduct of the judges. In the reign of David II., for instance, in 1357, and again in 1369, when Acts were passed to ensure by this means the removal of incapable judges, whether they held their office by feudal right (in fee) or not, and the substitution for them of "good and sufficient" officers.[87] Under Robert III. the Estates direct the justiciar "to take knowledge of the officers (sheriffs, etc.) how they govern themselves in their offices, and punish them for their defaults." [88] Similar enactments, directing the punishment of negligent judges, recur in the reigns of the first three Jameses.[89] James II. sought to provide a more effective remedy by a statute ordaining that no new regalities be henceforth granted without consent of Parliament, and that no office be given in fee and heritage, with reservation of those granted since his father's death.[90] Its ultimate futility is shown by the recurring complaints of the following reign and the equally futile measures taken by Parliament to weed out and punish defaulters.[91] Parliament itself, as well as its judicial Committee, is found hearing appeals [92] against an unjust judgment by one of the justiciars on the north side of the Forth, and adjudging that "it was evil given and well gainsaid." [93] Under the third James the scandal of incapable or corrupt judges was, indeed, exceptionally flagrant. It is reflected in the literature of the time as well as in the Statute Book, if we may attribute

[85] "Acts," ii. 238.
[86] *Ibid.*, ii. 249.
[87] *Ibid.*, i. 492, 508-509.
[88] *Ibid.*, i. 573-574; *cf.* 570-571.
[89] *Ibid.*, ii. 3, 21, 33, 35, etc.
[90] *Ibid.*, ii. 43.
[91] *Ibid.*, ii. 94, etc.
[92] Appelatio, Scots, "Falsing of Dooms."
[93] *Ibid.*, ii. 114, 117.

to this reign the poem incorporated in the "Book of Pluscarden"—

> "Thy judges all that are justice to lead
> Abuse ofttimes their jurisdiction,
> Stopping the law for love, friendship, or for feud,
> For dread or request, for bribery or reward."

Evidently, except under the strong rulers, the attempts at reform by inquisition and punishment were of little avail. We must, however, make allowance for the turbulence and anarchy of the greater part of this reign and the frequent minorities of the period. In such intervals when the central power was impotent to maintain security and order, the officers of justice were often enough as much the victims as the agents of arbitrary delinquents. They were also liable to the interference of the King's Council—not always from motives of impartial justice—for the Council was partisan and corrupt when faction disposed of the Government. Moreover, the hereditary jurisdictions of the Lords of Regality in particular tended to obstruct the course of justice, as we learn from repeated Acts of Parliament on the subject.[94] In virtue of their almost regal powers these lords could prevent the justice and his deputes from coming within their territories, and could "repledge" or reclaim from them any inhabitant of the Regality accused of crime, even if it were committed beyond its bounds. "On the entry of such a claim in any trial," says Hume, "the justice, before surrendering his prisoner, could only thus far provide for the public interest that he took caution of *Culreach* (as it was called) from the Lord of Regality that he would proceed to try his subject by a certain day; and caution also from the prosecutor and the prisoner for their appearance at the diet thus appointed." [95]

The Clerk of the Court of the Justiciar was known as the Justice-Clerk. He is frequently mentioned in the Acts of Parliament from James I. onwards,[96] and acted as his assessor in the trial of causes, though he did not till the seventeenth century become a judge under the title of the

[94] See, for instance, ii. 24 (James I.); 49 (James II.); 225 (James IV.); 347 (James V.).

[95] "Commentaries," i. 40.

[96] See "Acts," ii. 7, 37, etc.

Lord Justice-Clerk.[97] As Clerk of the Court he was responsible for the preparation of cases to be tried at the justice ayres. Before proceeding on circuit the justiciar issued to the sheriff of the shire in which the court was to be held what was known as a brief of dittay, or indictment, for the purpose of eliciting information regarding the crimes committed within the bounds of the sheriffdom.[98] The brief ordered the sheriff to summon those within every burgh, town, and barony of the shire fitted to give information, who were bound to appear before the Justice-Clerk or his deputes for this purpose. From the information thus obtained the Justice-Clerk drew up a roll of the names of the persons accused and a file of the indictments against them.[99] The next step was to issue precepts to the coroners and other officials for serving the accused with their dittay and securing their arrest and summoning the witnesses against them.[100]

Neither the justiciar nor the sheriffs and lesser judges had absolute jurisdiction. An appeal was permissible from the lower to the higher court, and the process of appeal ("falsing of dooms") was regulated by an Act of 1504. From this Act we learn that a dissatisfied party might appeal from the decision of the court of the baron or free-holder to his immediate superior or to the sheriff. Similarly from the court of the sheriff, steward, bailie, or other officer an appeal lay to that of the justiciar, and from the burgh court to the Chamberlain and the Court of the Four Burghs. From the justiciar an appeal could be taken to a special court instituted for the purpose, in place of the judicial committees of Parliament and Council which had hitherto exercised an appellate jurisdiction.[1]

The sheriff was, till about the middle of the sixteenth century, more the president of the court than a judge, the decision in civil causes resting with the assize or jury before whom suits were tried.[2] His office, like that of justiciar,

[97] Hume, i. 13-15.
[98] "Acts," ii. 51, 225, etc.
[99] "Portuous Roll and Traistis Acts," ii. 331.
[100] Hume, i. 27-28.
[1] "Acts," ii. 246.
[2] Littlejohn, "Records of the Sheriff Court of Aberdeenshire," Introduction, i. 14.

became hereditary. In the case of Aberdeen, for instance, it was held from the end of the fourteenth century to the beginning of the sixteenth by the Earls of Crawford, when it passed to the Earl of Errol and subsequently to the Earl of Huntly.[3] Like the justiciar, too, the sheriff had his deputes and also his clerk, who aided him in the discharge of his functions. The office of clerk was a responsible one, and in view of the fact that it was part of the sheriff's duty to collect and account for the revenues of the shire to the exchequer, the clerk was appointed by the king, whose interest it was that this responsible official should depend on him.[4] Both sheriff and clerk derived their revenue from a proportion of the fees, escheats, and fines within the shire.

[3] Littlejohn, "Records of the Sheriff Court of Aberdeenshire," Introduction, i. 35.

[4] *Ibid.*, i. 39-40.

CHAPTER IV

PARLIAMENT

As we have seen, the Parliament grew out of the Great Council of the early feudal period, and the latter term continued to be applied to it, though the former became the distinctive title. By the admission of burgesses to its deliberations, towards the end of the reign of Robert I. (1326) it became the Assembly of the Three Estates, and the deliberations of this assembly tend to show that already at the outset it wielded considerable powers. It was concerned particularly with the question of taxation, and made a grant on certain conditions, including the redress of grievances, which the king undertook to observe.[1] Two years later it considered and ratified the Treaty of Northampton, guaranteeing the independence of Scotland. Ten years earlier what was called a Parliament had regulated the succession to the crown, though it does not appear that in the Assembly of 1318 the representatives of the burghs were included. Thus by the end of Bruce's reign the Great Council or Parliament, in the sense of the Assembly of the Three Estates, had attained a recognised position as an essential factor in the government of the kingdom. Its co-operation and consent in such important matters as taxation, the negotiation of treaties, the regulation of the succession, seem to be taken for granted. These acknowledged powers had gradually developed in the early feudal period, when the Great Council of those holding of the crown had taken definite shape. With the admission of representatives of the royal burghs to the feudal council, the assembly assumes a more comprehensive and definite character as the embodiment of the national will than the

[1] "Acts," i. 328.

old and rather vague "community of the kingdom." Its powers likewise appear more definite and extensive. There may be no distinctive enactment of these powers. The Constitution was the product of the feudal system, and had gradually evolved the forms and powers attained by the end of Robert's reign. Evidently, however, the special circumstances of this reign had contributed to accelerate this evolution. Robert I. owed his position as king to the heroic devotion of the people as well as to his own military skill and valour. The successful struggle for independence had energised the nation, and its great leader may have sought to turn the spirit of enterprise to account in the work of government as well as the art of war. At all events he would seem to have realised the need of continued co-operation between ruler and people for the national welfare. The poverty of the crown rendered the appeal to the national generosity imperative, and the financial help which the burghs could give was substantial. The outlook for the future succession was hazardous, and in view of the recent troubled history of the nation on this score, the need for national agreement was clamant. Equally so in the case of the negotiation of a feasible arrangement of the bitter struggle with the English enemy. The national situation and the foresight of the king thus sufficiently explain the importance of Robert's reign from the constitutional point of view.

It was a promising beginning, and in some respects one of far-reaching importance. Legislation and government by the king and the Estates became actually, as well as in theory, the distinctive fact of the Constitution in its mediæval form. The Parliament became a permanent institution; equally with the kingship an integral part of the national life. It bulks largely in the history of the period from the War of Independence to the Reformation, though, unfortunately, we know so little about its deliberations apart from the laws and other decisions which it enacted. The record of its Acts tells us little or nothing of the discussions which preceded their enactment. It met frequently throughout the fourteenth century. In the beginning of the fifteenth, during the captivity of James I.,

its meetings were few. But during James's actual reign it met nearly every year, and sometimes more than once in the same year. Throughout the remainder of the fifteenth century the frequency of its sessions is also remarkable. They are less numerous in the reign of James IV., but the frequency recurs in that of James V. and in part, at least, of that of Queen Mary.

It should, however, be borne in mind that not all the meetings of the Estates, to which the term Parliament has been applied, were Parliaments in the full and regular sense. There were occasionally emergency meetings of such lords temporal and spiritual as could be got to attend on short notice, and on these occasions the burgh representatives were often absent. To these emergency meetings the term General Council, in distinction from the ordinary Parliament, seems to have been applied. The Parliament appears to have been summoned on a notice of forty days at least and was, in the words of Professor Hannay, "the Supreme Court and most authoritative Council," whereas the General Council was "a court of narrower competence than Parliament, and subject in some measure to the selective power of the crown." The General Council, which from about the middle of the fifteenth century tended, in fact, to acquire the character of a reinforced Privy Council in case of emergency, was summoned on shorter notice, and had a more limited authority.[2] Such Councils, which were not Parliaments in the full sense, were frequently held in the fourteenth and fifteenth centuries. In the reign of James V. the term "Convention," as applied to these emergency meetings, comes into use, though not exclusively, and the summons is by letter, not by "precept," as in the case of the regular Parliament.[3]

In view of the prominence of the Parliament in the history of Scotland during this period, historians like Cosmo Innes and Hill Burton have emphasised its importance as the cornerstone of the mediæval Constitution. From the reign of Robert I. onwards parliamentary government is

[2] *Scottish Hist. Rev.*, January 1923, 98, 100; April 1921, 166; July 1923, 283.

[3] *Ibid.*, January 1923, 102-105.

the salient fact of Scottish constitutional history. There is, indeed, some evidence tending to support this assumption. In the reigns of David II. and Robert II. and III. in the fourteenth century, at the beginning of the reign of James IV., and again at the Reformation, Parliament appears as assuming large powers and asserting its will in no uncertain terms. On other occasions the formulæ of some of its enactments seem to favour this conclusion. James I., who was influenced by English political institutions during his captivity in England, is regarded as a staunch constitutionalist, and he certainly attempted to reform Parliament after the English model. John Major, as we have noted, Boece, Knox, and Buchanan were firm believers in the theory of a monarchy limited by Parliament. This was a commonplace of the scholastic political theory, and it was, in part at least, from this source that Major and his fellow-historians derived their constitutional doctrine. They seem to have read the history of this period in the light of this constitutional doctrine, though the influence of the actual institutions of their country doubtless contributed to shape their political teaching. It is, however, questionable whether the legislators of the Scottish Parliament throughout this period were the conscious upholders of any system of constitutional rights and liberties, the protagonists on principle of any theory of parliamentary government, as we understand it. A recent writer has stoutly maintained the negative in a thesis written for an Oxford prize and published in 1901.[4] The author seems rather disposed to view Scottish history in the light of his theory. At the same time the history of the period does tend to create the impression that the Scottish Parliament was the creature of circumstances rather than the conscious agent of parliamentary government or the protagonist of a definite constitutional theory. There is much to be said for the contention that under a strong ruler like James I., James II., or James IV., it was the conventional medium of the royal will, and that under the weak rulers and during the frequent royal minorities of the period it was the submissive tool of

[4] Rait, "The Scottish Parliament Before the Union of the Crowns."

some magnate or faction who wielded the Government for the time being. In such circumstances it seems to have been little more than the conventional means of making known what the king and his Council had done or wished to do. Moreover, during the first half of the period the representatives of the burghs were frequently absent from its meetings, and it was not till the middle of the fifteenth century that their attendance became the regular practice. The burghs had, in fact, their own court or assembly in which questions affecting their welfare were decided apart from parliamentary sanction or enactment. The burgesses were thus not particularly interested in parliamentary government. It is therefore not quite accurate to assert, as does Mr Cosmo Innes, that "from henceforth (1326) the representatives of the burghs formed the Third Estate and an essential part of all Parliaments and General Councils." [5]

At the same time the statement is theoretically correct. In the fourteenth century and later, the Parliament is assumed to consist of the Three Estates, whether all were present or not. In this respect it resembled the French States General rather than the English Parliament, which, according to Mr Pollard, was composed at first and for long, not of Three Estates, but of various "grades" of persons included in it, which might be six or more.[6] It was not till the fifteenth century that the phrase The Three Estates began to be applied, erroneously as Mr Pollard thinks, to the English Parliament.[7] In Scotland, on the other hand, the phrase, The Three Estates (*Tres Communitates*, or, less frequently, *Tres Status* [8]), is frequently applied to the Parliament, and these consist of the clergy, barons, and burgesses. The clergy at this period consisted not only of the higher clergy—bishops, abbots, and priors—but also of members of the lower clergy, who ultimately, by the end of the fifteenth century, seem to have been confined to those who held some official position in the

[5] "Scotch Legal Antiquities," 116.
[6] "Evolution of Parliament," 61 f.
[7] *Ibid.*, 70.
[8] "Acts," i. 493, 501, 503, 507, 547, 549, 555, 570, 572.

Government.[9] The Estate of the barons consisted originally of all free-holders of the crown; the Third Estate of the commissioners of the burghs.[10]

Both the lesser barons and free-holders and the burgh members seem, however, to have become remiss in their attendance, which was a heavy burden in those days of difficult travelling. So general did this disinclination to attend become, particularly on the part of the lesser barons and free-holders, that James I. got a statute passed in 1425 ordaining that all prelates, earls, barons, and free-holders of the crown should appear in person and not by procurator.[11] The Act was so ineffectual that two years later (1427) it was deemed advisable, in order to secure at least a representative attendance of the smaller barons and free-holders, to institute two or more elected representatives of each sheriffdom to attend in their behalf.[12] The device proved equally futile in spite of the fact that the electors were to contribute to the expense of their attendance. The old obligation of all free-holders to attend seems formally to have held good, notwithstanding this abortive attempt to depart from it, and in the following reign it was necessary once more to waive the obligation in the case of the lesser free-holders, who were not barons, unless specially summoned by the king.[13] In that of James III. we again hear of unwillingness on the part of "the Estates and lords to come to the Parliament to give their counsel to the welfare and public good of the realm," and such are declared to be at default and to be blamed for their remissness.[14] The remissness is accepted as a matter of course in the reign of James IV., as far as the lesser barons and free-holders, whose land was assessed at 100 merks, are concerned, who in a couple of Acts are exempted from the old penalty ("unlaw") for non-attendance, unless specially summoned, so long as they send a procurator to answer for them along with the barons of the shire.[15] The result was that, while Parliament still

[9] See Rait, "Parliamentary Representation in Scotland," *Scottish Hist. Rev.*, January 1915, 116-117.

[10] See the references in "Acts," i., given above.

[11] "Acts," ii. 9. [13] *Ibid.*, ii. 50 (1457). [15] *Ibid.*, ii. 244, 252.

[12] *Ibid.*, ii. 15. [14] *Ibid.*, ii. 165.

consisted of the Three Estates of clergy, barons, and burgh members, the attendance of the smaller barons and free-holders ultimately ceased, and as in the case of the lower clergy, the lesser barons (lairds) who attended were those occupying official positions, or those few who acted as procurators for others. The Estate of the barons thus dwindled into those who were summoned by the king, and were known as "Lords of Parliament" (*Domini Parliamenti*).

The impression we derive from such enactments is that up to the sixteenth century the duty of taking a share in parliamentary legislation is one that the ordinary free-holder shunned as a troublesome and unwelcome privilege. Parliamentary government was in rather a bad case when even the more considerable free-holders had to be threatened into attending, and the attendance of the lesser was past hoping for. Up to the Reformation the latter, owing to their lack of interest, were practically unrepresented in Parliament except in so far as they sent procurators in their behalf. It was only as the result of the great religious struggle, in which they bore so great a share, that the disused obligation came to be regarded as a right and privilege, and the small barons as well as the great appeared in force at the Convention of the Estates which established the Reformation. "The Assembly was great," says Knox, in spite of the absence of the more staunch adherents of the old Church, the reason being that the Privy Council had given advertisement "to all such as by law and ancient custom had, or might claim to have, vote therein." [16] "The States are so well assembled," wrote Maitland to Cecil, "that I remember not in my time to have seen so frequent a Parliament." [17] The bulky list of the smaller barons present [18] bears out the words of Knox and Maitland, and bespeaks the interest in the common weal which the Reformation had awakened in a class so long indifferent to its constitutional rights and duties. On this occasion they presented a petition claiming to have "free voice in Parliament" in virtue of the Act of James I., which the remissness of their ancestors had made a dead letter.

[16] "History," ii. 87-88. [17] Knox, "Works," vi. 115.

[18] "Acts," ii. 525-526; *cf.* Teulet, "Papiers d'État relatifs à l'Histoire de l'Écosse," i. 614 (Ban. Club, 1852-60).

"The Act," says Randolph in a letter to Cecil, "passed without any contradiction."[19] The motive of this zeal might be religious rather than constitutional, and there was, of course, the usual manipulation of the situation by the party in power. But the Reformation undoubtedly quickened the spirit of political liberty as well as religious conviction and passion, and henceforth the tendency to evade the rights and obligations of citizenship gives place, in the lesser barons and the burgesses alike, to a growing self-assertion in public affairs.

Their influence is equally apparent in the revolution of 1567, which deprived the queen of her crown in favour of her son James VI. The decisive influence in government and legislation was, in fact, passing from the hands of the magnates or lords of Parliament, into those of the middle class, which the Reformation called into being as an active force in the national life. "Methinks," wrote Killigrew, Elizabeth's Minister in Scotland in 1572, "I see the great noblemen's credit decay in this country, and the barons, burghs, and such like take more upon them." Significant of this progress is the fact that thirteen years later (1585) the Act of 1427 was re-enacted, empowering the free-holders under the degree of prelates and lords of Parliament who held land of the king of the value of at least forty shillings to elect two of their number annually to represent them in Parliament.[20] After fully a century and a half of abeyance, the reform measure of James I. thus obtained a recognised place in constitutional practice.

Constitutional development was still more hampered by the peculiar institution which came to be known as the Lords of the Articles—the measures presented to Parliament for its acceptance. These Lords were a committee to which the Estates delegated the actual business of the Parliament, instead of themselves discussing the measures which the Parliament was ostensibly summoned to consider. Ulti-

[19] Knox, "Works," vi. 117. For a criticism of the constitutional validity of this measure, see Lang, "History of Scotland," ii. 73-74; Hume Brown, "John Knox," ii. 87.

[20] "Acts," iii. 422. The Act was ratified by the king in 1587 on reaching his majority, iii. 509.

mately it met only to nominate the members of this committee from its own ranks, and only reassembled to vote approval or disapproval of the Acts or Articles which it presented for its sanction. In virtue of this singular practice it became little more than a registering body, somewhat after the fashion of the Parliament of Paris to which the function of registering the royal decrees accrued in France. The Paris Parliament (a court of justice possessing certain political functions) virtually took the place of the French States General after their abeyance under the Bourbon kings, and it might be said that in Scotland the Lords of the Articles similarly took the place of the Three Estates as far as their actual legislative function was concerned. At all events the existence of this committee and its manipulation of the main function of Parliament—the formulation of legislative measures by corporate criticism and deliberation —practically rendered the meetings of the Estates very much of a formality. These meetings ultimately amounted to little more than the election of the committee and the voting of its decisions in the form of the Articles finally presented to them. It is evident that this singular device tended to reduce both the power and the independence of Parliament to a minimum. The committee being empowered "to hold the Parliament," as the phrase ran, the powers of the Estates were really in the hands of a section of its members—a sort of junta which could thus exercise a decisive influence in legislation. The Estates might retain the power of approval or disapproval, but in practice the vote was little more than a formality. Moreover, as the Lords of the Articles were oftener than not amenable to the influence of the Government—whether the Government was in the hands of a strong ruler or of the faction which controlled him, if he happened to be a minor or a weakling—the tendency of this device was to make Parliament the tool of the Government for the time being, as far as legislation was concerned. Parliament, as we have noted, might be much in evidence throughout the period. It was the interest of both the strong ruler and the magnates who wielded power for the time being to invest their measures with its formal sanction. But in view of this flaw in its

Constitution, it would be guileless indeed to infer from its apparent activity that it stood for parliamentary government in the real sense. Its history is largely automatic. It represents rather government by committee than government by an organic body, and even the committee was too often the representative, not of the Estates, but of the faction uppermost for the time being. Its history must be read in the light, not of its Acts, but of the political conditions of the time.

This expedient seems, in part at least, to have grown out of the remissness of its members in attending its sessions, or the difficulty of prolonging their attendance, and also the advisability of avoiding at times the public discussion of the measures to be considered. This, at least, appears as the main reason for the institution of the committee in the early instances in which its appointment is mentioned, and there is no need to seek in the English Committee of Lords Ordainers in the reigns of the first three Edwards, or in the device of delegating the power of Parliament to a committee, adopted by Richard II., the prototype of its adoption in Scotland.[21] The first mention of its appointment occurs towards the end of the reign of David II. (1367), when certain persons were elected "to hold the Parliament" and permission was given to the other members to return home by reason of the harvest.[22] In the Parliament held in the following year there is no mention of the appointment of a committee. But in the next, in 1369, the election "to hold the Parliament" is again noted, the reason being the economic pressure of the time which necessitated the speedy return of most of those present.[23] In 1370 the committee is again elected on the ground that it was not expedient that "the whole community" should await or take part in the deliberations of the session. In the beginning of the

[21] Dr Neilson inclines to adopt this explanation. "Acts of the Lords of Council," ii. Introduction, 37. This monopoly of legislation on the part of a Committee of Estates is, however, paralleled by the action of the King's Council in England which on many occasions controlled the preparation of English statutes. Baldwin, "The King's Council," 319-320.

[22] "Acts," i. 501.

[23] *Ibid.*, i. 506.

reign of Robert II. the precedent of the former reign was expressly adopted for the purpose of deliberating on "certain special business before it should be brought to the notice of the General Assembly," leave being given to the others to go home.[24] There is an interval of fully fifty years before we light on the next notice of its election at the beginning of the actual reign of James I. (1424), when certain persons were elected "to determine the articles presented by the king" (the first mention of this term as applied to parliamentary business[25]), the others being allowed to go away. The election is again mentioned in the three Parliaments held in 1426.[26] In the other Parliaments of James I. and those of his son James II., the committee seems to have been quiescent. At all events there is no notice of its election, and it is not till the early part of the reign of James III. that it reappears. In 1468 "power is committed by the whole Three Estates to certain persons to advise, commune, and conclude upon the matters which follow."[27] Henceforth it becomes an established institution, and its powers are materially enlarged. To a committee appointed in 1469 "the full power of the whole Parliament" is committed, and the scope of its deliberations included, besides some specific points, "all other articles that shall be thought speedful for the honour of our sovereign lord and the common good of the realm."[28] The election of the Lords of the Articles is a feature of nearly every Parliament summoned by James III., and the commission of the whole power of Parliament to them or to special committees is a frequent occurrence.[29] The amount of business actually transacted by the whole Parliament is very limited. The recrudescence and the prominence of the Lords of the Articles under James III. may have been due, as Professor Rait thinks, to his weakness as a ruler—the device adopted by the magnates who engrossed the Government in the interest of their own power. This motive may, indeed, possibly have had something to do with the institution of

[24] "Acts," i. 547.
[25] *Ibid.*, ii. 3.
[26] *Ibid.*, ii. 9, 13, 26.
[27] *Ibid.*, ii. 89.
[28] *Ibid.*, ii. 97; *cf.* 114, 117, 122, 146.
[29] See "Acts," ii. 100, 101, 114, 117, 122, 146, 184.

the committee from the outset in the second David's weak reign. Professor Rait further discovers in its institution a set policy on the part of the barons to exclude, in the baronial interest, the burgh representatives from a share in legislation.[30] The fact that the committee reappears in the reign of a weak ruler like James III. after its virtual suppression under his two vigorous predecessors, who appear to have preferred legislation by the Estates as a body under their personal manipulation, and that it is first heard of under the weak rulers of the latter half of the fourteenth century, seems to lend some weight to the former inference. It is more difficult to maintain the further suggestion of an attempt on the part of the barons to diminish the influence of the burgesses in legislation by means of this device, in view of the fact that they were from the outset included in its membership, and that under James III. in particular they appear as members of the committee. Moreover, the method of legislation by committee is a distinctive feature of the reign of James IV.,[31] whose vigorous personal rule precludes the above explanation, and the ultimate permanence as well as the adoption of this device seems to show that it was largely due to the tendency on the part of barons and burgesses alike to evade the burden of attending the full session of the Estates.

That, however, the manipulation of the committee was not unknown at times when the royal authority was weak appears from the contention and party spirit which are reflected in the Parliaments of the minority of James V. In that of February 1525 this party spirit found expression over the election of the Lords of the Articles, the queen mother herself taking part in the quarrel, and her supporters—the Earls of Arran, Cassilis, and Eglinton, the Archbishop of Glasgow, the Abbot of Scone, and the Bishop-Elect of Ross—protesting vigorously in her behalf against the opposite faction. Several of them "asked instruments" and "dissented" from the choice of the Lords of the Articles in favour of those for whom they had voted.[32] It was a case

[30] "Scottish Parliament," 48-57.
[31] See, for instance, "Acts," ii. 211, 228, 230.
[32] *Ibid.*, ii. 289.

of one faction seeking to overawe the other over this crucial question. At the meeting in July of the same year instruments were again taken and protests made, and during the next two years, when Angus held possession of the young king, the Parliament and its committees were merely the tools of this magnate and his faction. After his overthrow in 1528, the king himself, now actual ruler, made his influence felt in the direction of government and legislation. In 1535 he gave a deliverance on the subject "with the advice and consent of the Three Estates," which reveals the tendency to subordinate the deliberations of the committee to the royal will. In view of the number of measures to be taken for the "good rule, justice, and police of the realm," and the fact that these cannot be hastily determined, the full power of Parliament is devolved on the persons "elected to the Articles . . . to devise and make such acts, statutes, and constitutions conform to the Articles to be given by the king and others." The scope of their deliberations is more limited than under James's predecessors, for they may only discuss such other matters concerning the king and his affairs as it shall please him to bring before them. Subject to this limitation, their decisions are to have the same strength and effect as if they were ordained by all the Estates personally present,[33] though the king retained the right to summon his prelates and barons for the deliberation of other weighty matters.

Whilst this deliverance was made for a special occasion, it expresses the constitutional position of the committee in the sixteenth century. Parliament met to elect the Lords of the Articles, and these virtually controlled the legislative measures to which it gave its formal assent. They appear as exercising their important function in the reign of Queen Mary, though their election is not always particularised: in the case of the Reformation Parliament of 1560, for instance. But in this case we learn from Knox that the Reformed Confession of Faith was submitted to the Lords of the Articles before being read to and voted by the whole Assembly.[34] From Randolph, the English Ambassador, we

[33] "Acts," ii. 340.

[34] "History," ii. 121.

further learn the method of their election which seems to have prevailed since the beginning of the sixteenth century, and, we may infer, from an earlier period.[35] The order of election was, he tells us, that the spiritual lords chose the temporal, and the temporal the spiritual, and the burgesses their own representatives.[36] From the same source we have a sketch in a letter to Cecil in June 1563 of the procedure of the Parliament as it obtained in Queen Mary's reign: "Their Parliament here has begun, the 26th ulto.; the Queen, accompanied with all her nobles and above thirty picked ladies, came to the Parliament House, her robes upon her back and a rich crown upon her head. The Duke (Chatelheraut) next before her bore the regal crown, the Earl of Argyll the sceptre, and the Lord of Murray the sword. She made an oration to her people. . . . The Lords of the Articles are chosen and sit daily at the Court, where ordinarily the Queen is present, in debating all matters. Upon Friday next she comes again to the Parliament House to confirm such Acts as are concluded upon, and to prorogue the Parliament." [37]

The Scottish Parliament, as thus constituted, presents a striking contrast to that of England. The attempt of James I. to reform it after the English model failed. He tried to introduce the English representative system of knights or commissioners of the shires as representatives of the Commons, and the election by them of a common speaker or president, with power to "propone" in Parliament all measures affecting the Commons. He evidently contemplated the introduction of a House of Commons within the Parliament with an elected speaker to take the place of the chancellor as its president.[38] As we have seen, the experiment in English constitutionalism proved abortive, and the Estates continued to sit and vote together. There

[35] In the Parliament of 1525 it is incidentally stated that the temporal lords chose the spiritual, and this is referred to as the conventional practice.

[36] Letter to Cecil in 1560. "Calendar of State Papers," Foreign Series, Elizabeth (1560), 220.

[37] "Calendar of State Papers," Foreign Series, Elizabeth (1563), 381-382.

[38] "Acts," ii. 15.

is little in the history of this single legislature to compare with that of the two-chamber Parliament of England as a dynamic in the national life. Its constitutional development was hampered by the system of legislation by a fully-empowered committee and by the lack of a due sense of the value of constitutional rights and liberties, an active interest in parliamentary government on the part of the free-holders. On the other hand, there are parallels in the history of the two institutions which should not be lost sight of in any comparison drawn between them. There are times in Scottish, as in English history, when the Parliament, in spite of its peculiar constitution, bade fair to become a real power in legislation and even in government. The self-assertion of the English Commons in the fourteenth century finds its counterpart in that of the Scottish Parliament in the second half of this century. Under David II. the Estates practically take both out of the hands of the incompetent son of Robert I. They assumed the right to control the expenditure of the taxes which they granted;[39] to regulate the coinage;[40] to direct the administration of justice both by their legislative activity and the regular appointment of a parliamentary committee to deal with causes and complaints;[41] to take measures to ensure the defence and the internal peace of the country.[42] They intervened in the negotiations between the king and Edward III. to save the independence of Scotland. They met the English proposal for a union on terms dangerous to this independence, which David II. was ready to grant, with a curt refusal. "They would in no wise concede or assent to the wishes of the King of England in this matter," and subsequently declared similar proposals "intolerable and inadmissible."[43] They called to account the royal officials for maladministration of their offices, even though they held these in virtue of hereditary grant by the king. They controlled the expenditure of the king himself, in view of the burden of paying his ransom, and required him to

[39] "Acts," i. 491, 498.
[40] *Ibid.*, i. 497.
[41] *Ibid.*, i. 492, 498.
[42] *Ibid.*, i. 492, 503.
[43] *Ibid.*, i. 497, 503; *cf.* Wyntoun's, "Originale Chronicle," ii. 506; and see MacKinnon, "History of Edward III.," 515 f.

renew his coronation oath not to alienate the crown lands.[44] They debarred the crown officers from putting in execution any royal mandate directed to them under the royal seal "against the statutes and common form of law."[45] These enactments might be but the necessary expedients to cope with the abuses of the corrupt régime of a thriftless and weak ruler. At the same time it does seem as if the Estates, finding their opportunity in the misgovernment of the king, took advantage of it to vindicate what they deemed their constitutional right as, equally with the king, the responsible guardians of the law and the national interest. Under the weak rule of the first two Stewarts they seem also to have asserted themselves on occasion. At the beginning of Robert II.'s reign, for instance, they agreed to the king's request that his eldest son should succeed him and further regulated the future succession.[46] They re-enacted the statute debarring the royal ministers from putting in force any mandate contrary to the laws.[47] They took an obligation of the king to reform abuses in the administration of the law.[48] The renewal of the Franco-Scottish alliance was made by their consent, and one of its conditions was that, in case of a disputed succession to the Scottish crown, the Scottish Parliament alone was to decide the question without interference on the part of France.[49] Under the equally weak Robert III. they explicitly attributed "the misgovernance of the realm and the default of the keeping of the common law" to the king and his officers, and arrogated to themselves the right to arraign and judge the latter as his responsible agents, if the king chose to lay the blame on them. To prevent the further maladministration of the kingdom they deemed it "most expedient" to appoint the Duke of Rothesay as his father's lieutenant in co-operation with the General Council of the kingdom, and to make his councillors answerable to and punishable by them for their actions.[50]

In view of such enactments, it is evident that the Scottish

[44] "Acts," i. 492.
[45] *Ibid.*, i. 502; *cf.* 509.
[46] *Ibid.*, i. 546, 549.
[47] *Ibid.*, i. 547.
[48] *Ibid.*, i. 550.
[49] *Ibid.*, i. 559-560; "Fœdera," iii. 925.
[50] *Ibid.*, ii. 572-573.

Estates in the latter half of the fourteenth century were in no way behind the English Commons in their attempt to control the executive. During the fifteenth there is less evidence of this self-assertion. The constitutionalism of James I. failed to call forth any adequate response on the part of the Estates. The constitutional doctrine attributed to Sir Robert Graham in the dramatic appeal to the Estates, related by an old chronicler, to vindicate their rights against the king, seems to be a pure invention.[51] The king's main motive seems to have been to energise the monarchy rather than to develop the power of Parliament. In any case the attempt proved abortive, owing to the lack of co-operation on the part of the Estates in supporting his reform policy. During the reign of James II., Parliament appears as the compliant instrument either of the faction that ruled during his minority or, as in the case of his father, of the personal rule of the vigorous young king himself. Constitutional progress is practically nil. During that of James III. the Lords of the Articles, as we have seen, mostly absorbed its functions, and they are found exercising on occasion the right to intervene in the direction of foreign policy. They objected energetically to the king's plan of crossing to France with an army to assist Louis XI. against his enemy, the Duke of Burgundy, and roundly declared that "they can in no wise give their consent to his passage furth of the realm" for such a purpose. James accordingly was fain to stay at home, and at their direction, to send an embassy instead.[52] They took an active part in questions of peace and war. They lent their authority, for instance, to the measures taken against "the riever Edward calling himself King of England" in 1481, and to the treaty concluded with his successor, now referred to as "Richard, King of England" in 1485.[53] An embassy is sent by their resolution to the emperor on the subject of letters of marque.[54] In internal affairs we have a declaration, evidently as the result of representations made to him by the lords, that "his majesty shall, with the help of God, and with the good and true counsel of his prelates, lords, and

[51] "Life and Death of James I.," 50.
[52] "Acts," ii. 103-104.
[53] *Ibid.*, ii. 138-139, 170.
[54] *Ibid.*, ii. 178.

wise, discreet persons, make justice be evenly ministered to all his lieges, and apply himself to the putting of good rule in all parts of his realm to the common profit and good thereof, where through all his true lieges shall have cause to be of good comfort." [55] The uprisings against the king in 1482 and at the end of the reign were explosions of aristocratic discontent rather than expressions of constitutional grievance, though the insurgent lords, after the murder of the king, professed in Parliament that their action was in vindication of the independence of the realm, which was endangered by the Anglophile policy of the king and his deceitful and perverse counsellors.[56]

But the tragic finale of James's rule evidently quickened the sense of parliamentary power as a check on the royal government. This is apparent from the Act drawn up by the Lords of the Articles, and bearing the authority of the Estates, "that account and reckoning be taken of all the king's officers, his treasurers and controllers, that auditors be chosen and named by the advice and authority of this Parliament." [57] This is a clear and peremptory assertion of the determination of Parliament to control the king and his Ministers. Equally so the additional declaration that the members of the king's Secret Council shall be sworn in the presence of the Estates to give him true counsel in all State affairs, and shall be responsible to the Estates as well as the king.[58] This undoubtedly reveals a grasp of constitutional principle. But it is the only important instance of it, as far as Parliament is concerned, till we reach the age of the Reformation in the middle of the next century. Despite this constitutional enactment, James IV. ruled, as he told Ayala, "exactly as he likes," and the secret of his personal rule is to be found not only in his own vigorous personality, but in the fact that he was not dependent on his Parliament for his revenue, of which Ayala gives an account, and which was derived from the crown lands, the customs, feudal dues and casualties, fines and escheats, ecclesiastical vacancies, etc. "He is in want

[55] "Acts," ii. 139.
[56] *Ibid.*, ii. 210-211.
[57] *Ibid.*, ii. 220.
[58] *Ibid.*, ii. 220.

of nothing," says Ayala, "judging from the manner in which he lives, but he is not able to put money into his strong boxes." [59] Taxation might be the prerogative of Parliament, and various Acts record the grants of the Estates for specific or extraordinary purposes.[60] But a strong king like James could get what he wanted in the way of additional revenue of this kind. His successor, James V., after the stormy years of his minority, was as little troubled with constitutional claims as his father, and it was only in the revolutionary years of his daughter's reign that, under the inspiration of the Reformation struggle, these claims, as we have seen, were once more made and exemplified in a far more effective fashion in 1560 and 1567. In the Treaty of Edinburgh, for instance, the king and queen are debarred from making war or peace without the counsel and consent of the Estates, and the Government was placed, during the queen's absence, in the hands of a Council of twenty-four members, of whom their majesties were to appoint seven and the Estates seventeen, and all officers of State were made responsible to this Council.[61] The determination to subordinate government to the will of the Estates, as represented by a majority of the Council, is unmistakable, even if the arrangement was only of a temporary nature.

The changed spirit of the Estates, especially of the representatives of the smaller barons and the burghs, found its most characteristic expression in Knox. Knox was a strong constitutionalist in his own characteristic fashion. But he was ready to lead a religious revolution to the bitter end, under constitutional form, if it could be done; if not, with supreme indifference to royal rights or susceptibilities, if needs must. In regard to the Parliament of 1560, for instance, when the question of the legality of its proceedings emerged, the people had, in his opinion, unquestionably declared its will, and the will of the people, always supposing

[59] "Early Travellers," 43. On the sources of the royal revenue during this period, see Cochran Patrick, "Mediæval Scotland," 84 f.

[60] "Acts," ii. 219, for instance; *cf.* 233. For Robert III.'s reign (general contribution for the common needs of the kingdom), i. 574.

[61] Knox, "History," ii. 73 f.

it in accordance with the will of God as he interprets it, is for him decisive. He not only claims that all those present, having been duly summoned, had a constitutional right, "by law and ancient custom, to vote therein," [62] but that the lack of the royal ratification did not invalidate its Acts. "But somewhat must we answer to such as have whispered that it was but a pretended Parliament and a privy convention and no lawful Parliament. Their reasons are, the king and queen were in France; there was neither sceptre, sword, nor crown borne, etc., and some principal lords were absent. . . . In whose default, we pray you, was the queen absent from this realm? We think they (the Papists) will not be so shameless as that they will blame the Protestants thereof. Her person was absent, and that to no small grief of our hearts. But were not the Estates of her realm assembled in her name? Yea, had they not her full power and commission, yea, the commission and commandment of her head, the King of France, to convocate that Parliament, and to do all things that may be done in lawful Parliament, even as if our sovereigns had been there in proper persons? . . . Hitherto we have understood that wheresoever the councillors of the king, with his power and commission, are assembled to do anything at his commandment, that there is the king's sufficient presence and authority, wheresoever his own body be living at freedom and liberty. . . . We are bold to affirm the Parliament to have been more lawful and more free than any Parliament that they are able to produce this hundred year before it, or yet any that hath ensued since it was; for in it the votes of men were free and given of conscience; in others they were bought or given at the devotion of the prince. All things in it concluded are able to abide the trial and not to be consumed at the proof of the fire. Of others the godly may justly call in doubt things determined. To the sword and sceptre, nor yet to the absence of some lords we answer nothing; for our adversaries know well enough that the one is rather a pomp and a glorious vain ceremony than a substantial

[62] "History," ii. 88.

point of necessity, required to a lawful Parliament, and the absence of some prejudges not the powers of the present, provided that due advertisement be made unto them." [63]

This might not be an academic solution of the problem; but it satisfied Knox, and it corresponded to the principle of the supremacy of Parliament in Government as well as legislation to which the Estates had formerly on occasion given decisive expression.

The independent and aggressive spirit born of the Reformation contrasts strikingly with that of the English Parliament during the same period. This fact has not been sufficiently borne in mind by those who have drawn a comparison between the two institutions to the disadvantage of that of Scotland. The Scottish Parliament, in contrast to that of England, has been supposed to have been consistently the pliant tool of the individual or the faction predominant in the State for the time being. Its history in the fifteenth and early sixteenth centuries may go far to bear out this contention. But what of that of the English Parliament throughout a large part of the same period? Was it in any better case? Under the Tudors, from Henry VIII. to Elizabeth, it was largely the instrument of the royal will. In virtue of its packed majorities, it submissively registered this will in overthrowing the papal jurisdiction in the reign of Henry VIII. It legislated in favour of the Reformation under Edward VI. It restored the papal authority under Mary, and once more overthrew it under Elizabeth. In these matters it simply registered the will of the Government for the time being. In Scotland, on the other hand, it established the Reformation in the teeth of the opposition of the Queen Regent and her daughter Queen Mary, and, despite the tortuous policy of the politicians, it ultimately ratified it even at the cost of the abdication of a sovereign who had forfeited the allegiance of the nation. It certainly proved on this, as on some other occasions in the past, that it had a will of its own, when the interest of the nation, as distinct from that of the sovereign, called for its exercise even at the cost of a revolution. In

[63] "History," ii. 126-127.

this respect it gave promise of its future rôle as the vindicator of civil liberty as well as religious conviction. Throughout the two and a half centuries preceding the Reformation it created and preserved the tradition of constitutional rights and liberties to which the progressive forces of subsequent times could appeal with a greater chance of a ready and permanent response in the coming struggle for their preservation and extension.

Even in the matter of the attendance of its members, the English Parliament could not always be held up as an exemplar to its more imperfect northern compeer. "There is hardly a Parliament of the first half of the fourteenth century," remarks Professor Pollard, "the opening of which had not to be postponed owing to defective attendance. . . . The summons of knights of the shire and burgesses does not prove their attendance; and when, later on, measures are taken to compel attendance at Parliament, they are applied to magnates long before they are enforced upon knights of the shire or burgesses." [64]

[64] "Evolution of Parliament," 115. The author is of opinion that the English mediæval Parliament has been greatly overrated as a representative institution. It was not national or representative in any real sense. It was the palladium of the privileges and liberties of certain classes at the expense of the liberty of the people. His book is bound to provoke a restatement of the older view as well as criticisms of the author's contentions.

CHAPTER V

THE BURGHS AND THEIR GOVERNMENT

THROUGHOUT this period, and especially towards the end of it, the burghs acquire an increasing importance in the national life. The War of Independence, indeed, checked for the time being the prosperity of those thriving centres of trade and industry. The recurring feud with England and the frequent intervals of internal anarchy during the next two and a half centuries retarded their development. Compared with the larger towns of England, Flanders, and Germany in the fourteenth and fifteenth centuries, their status and their history appear rather parochial and obscure. Nevertheless, they were a substantial force in the economic and political life of the nation, to whose independence and individuality they contributed a not inconsiderable share. From the rents and customs of the burghs came a large part of the royal revenue, and their commerce and industry yielded a considerable quota of the taxes levied for special purposes. Their corporate existence made itself felt, along with that of the Church and the barons, in the national Parliament. They had their own separate organisation in the court, later known as the Convention of the Burghs, equally with the Church, for administrative and legislative purposes. By the foreign trade which they developed they fostered intercourse with other lands and thus brought their country within the influence of the civilisation of the Continent. By their organisation they nurtured the corporate spirit and the interest in the common weal at a time when faction and the egotism of individual magnates tended to endanger it and disrupt the nation. They stood for the pursuit of the arts of peace and honest toil at a time when the rough barons professed the cult of arms and were too ready to regard war and local feud as the main business

or pastime of life. In the second half of the fifteenth century they began, in virtue of their growing economic importance, to play an increasingly active part in the national life. In the first half of the sixteenth they became a more distinctive political as well as economic force in moulding the destiny of the nation, as the history of the sixteenth century shows.

The burghs owed their rise to an acknowledged position in the body politic largely to the foreign trade of which they were the nurseries, and which was controlled by the merchant guilds. The Franco-Scottish Alliance, if it involved the country in the quarrels and conflicts of a foreign State, had the compensating advantage of furthering trade with France, though there were occasional disputes on this subject between the two countries. In virtue of this alliance, privileges were from time to time conferred on Scottish merchants, culminating in the naturalisation of all Scotsmen in France and all Frenchmen in Scotland in 1558, and furthering commercial intercourse between the east coast ports and Bordeaux, Rochelle, Rouen, and Dieppe. To these ports the Scottish merchants sent cured fish, horses, wool and woolfells, hides and other goods, and imported thence wines, fruits, salt for curing fish, etc. With the Baltic and Norway there was also a considerable trade in the fifteenth and sixteenth centuries. At Danzig there was a Scottish colony, and in the years 1474-76 as many as twenty-four Scottish vessels entered this Baltic port. In the following century from twenty to thirty vessels were engaged in the Baltic trade from Dundee alone, importing, in return for Scottish exports, timber, flour, grain, iron, and wax.[1] The most important foreign trade was, however, with the Netherlands, and the close commercial intercourse with Flanders was economically more valuable than the connection with France, since it did not entail the disadvantages of the political alliance with the latter country, though in the time of the first three Edwards it was hampered by English efforts to prohibit it in consequence of the war with England. Already in the reign of David II.

[1] MacKinnon, "Social and Industrial History of Scotland," i. 83-85.

this trade was so substantial that in 1347 a Scottish staple was established at Middelburg under a "mayor," later known as conservator, appointed by the Scottish merchants to take charge of their interests at the staple port.[2] During the fifteenth century Bruges became the chief centre or staple of the Scottish trade with the Low Countries. But with the decline of Bruges towards the end of the century, it again passed to Middelburg, though its monopoly was disputed by Antwerp and Campvere, and ultimately, towards the middle of the sixteenth century, it was definitely fixed at Campvere,[3] which practically remained the staple till the end of the eighteenth century.

Another early indication of this foreign trade in the fourteenth century is apparent in the Act passed in 1337, on the lines of one of the previous reign (1323),[4] ordaining that all stranger merchants were to be peaceably admitted to buy and sell within the kingdom in accordance with ancient practice.[5] A similar Act of 1482 was more explicit: "It is statute and ordained that in time to come all strangers be treated honourably with all favours whenever they come to any port of the realm, and that none of our sovereign lord's officers nor others his lieges trouble them nor put themselves, ships, or goods under arrest, but that they have full liberty and freedom to dispose upon their own goods and sell them to freemen without compulsion or violence." [6] Besides such encouragement by express Act of Parliament, the foreigner as well as the home importer was further favoured by the practical exemption of imports from the great custom (*magna custuma*) which was levied mainly on exports. They were, indeed, subject to the petty custom (*parva custuma*) levied on all goods entering a burgh either from the country or from abroad. But these were compar-

[2] "Acts," i. 514-515. The term staple was applied to the port where Scottish goods were landed, and to the goods carried—staple merchandise. Cochran Patrick, "Mediæval Scotland," 129-130.

[3] See "Extracts from the Burgh Records of Edinburgh," letter of James V. directing the burgesses of Edinburgh to trade only with Campvere, ii. 108.

[4] Davidson and Gray, "The Scottish Staple at Vere," 114-115.

[5] "Acts," i. 492.

[6] *Ibid.*, ii. 144.

atively insignificant, and throughout the period free trade in imports may be said to have been the rule.[7] Whilst the export trade was handicapped by the heavier tariff, the fact that the royal revenue was substantially derived from this source made it the interest of the crown to restrict this trade as little as possible by undue regulation. Acts of Parliament were, indeed, occasionally passed to prohibit or limit it, but these were mostly of a temporary character, due to the exigencies of war, or scarcity and the consequent rise in prices, or to the idea that the export to England, for instance, of certain articles such as salmon, in return for English cloth, was detrimental to the realm by lessening the amount of gold and silver coin within it.

On the other hand, the merchant guilds of the burghs were ever on the alert to prevent intruders outside their own ranks from participating in its benefits, and obtained legislation to exclude any but substantial burgesses from trading overseas.[8] They were, too, jealous of their exclusive rights to trade within the burgh and the district attached to it, and they strove to maintain the rights and privileges of the royal burghs as against the burghs of barony. In consequence of this narrow spirit internal trade was hedged about with numerous regulations and restrictions. They were further averse, in their jealousy of the craft guilds, to the development of home industries, and there was accordingly little industrial advance during this period. They favoured the export trade in raw materials and the import of manufactured goods, of which they had the commercial monopoly, and from motives of self-interest discouraged a policy of industrial development which would have added to the prosperity of the burghs and the wealth of the country. What seems to us a weakness of burghal policy, as directed by the merchant guilds, was not so apparent to that age. Trade and agriculture were the main sources of the limited wealth of Scotland till the middle of the eighteenth century, and a country with a small population and raw material confined to the simple products

[7] "Exchequer Rolls," i. Preface, 95.
[8] See, for instance, "Acts," ii. 86.

of agriculture and consisting mainly of wool, woolfells, and hides, could hardly have developed a thriving industry in competition with that of the Continent. Taking into account the adverse influence of recurring war and anarchy, it could hardly have made more material progress than it did up to the beginning of the sixteenth century. Judging from the revenue derived from the customs, its export trade had rather declined in the fifteenth, as compared with the fourteenth.[9] On the other hand, observers like Ayala, in the early part of the reign of James IV., comment favourably on the general progress to which the reign certainly gave an impulse. Though he evidently exaggerates the amount of the revenue derived from the customs,[10] he says that there has been a great increase in the closing years of the fifteenth century, and he notes that the towns were populous and prosperous and well built,[11] and that its commerce was much more considerable than formerly and was continually growing. Trevisano also refers to the burghs and their "devotion to mercantile pursuits" and the other "useful and mechanical arts."[12] The progress could not have been due entirely to the activity of James IV.'s reign, for well-built houses are not the creation of a few years. In the following reign we have evidence in the early part of Knox's "History of the Reformation" of the active commerce between the east coast ports and the Netherlands and Germany to substantiate the conclusion that in the early sixteenth century, before the devastation wrought by the English invasions under Hertford, the burghs, mainly in virtue of their foreign trade, had become a decisive force in the national life.[13]

As in the previous period, the burghs appear as self-governing communities, and the rights and privileges which

[9] For the figures for these centuries, see Mr Burnett's "Introduction to Exchequer Rolls," i. 95 f.; ii. 85 f.; iv. 125 f.; ix. 68; xi. 63 f.

[10] See Burnett, "Exchequer Rolls," xi. Introduction, 53.

[11] "Early Travellers," 42, 43, 47.

[12] *Ibid.*, 52.

[13] A French traveller in Scotland, writing in the middle of the century, says that during the previous fifty years the country had increased its former value sixfold. This is a far too favourable estimate. "Early Travellers," 74.

they had inherited from it were frequently confirmed by Act of Parliament from the reign of David II. onwards. In 1357, for instance, the Three Estates enact that "all the burghs and burgesses shall freely enjoy the whole of their rights, freedoms, privileges which they were used to have in time of good peace, and that no man shall dare unjustly oppress them within or outwith the burghs under the pain of breaking the protection of our lord the king." [14] Despite these general enactments it cannot be said that these rights and liberties remained inviolate throughout this period. Not only were they liable to be infringed by neighbouring magnates; they were adversely affected by the Act of 1469, which deprived the burgesses of the right to elect their magistrates and council. This right of election appears from the ancient Burgh Laws to have belonged to "the good men of the town" [15]—evidently the free inhabitants enjoying full civic rights.[16] Moreover, there is evidence in the "Burgh Records of Aberdeen"—the earliest extant instance of an actual election of magistrates—from which we learn that the alderman and bailies were elected to these offices by "the consent of the whole community of the burgh." [17] It further appears from the "Laws of the Guild" that, in the case of Berwick, the burgesses exercised the right of electing the Town Council as well as the magistrates,[18] and Berwick was the model for the organisation of the other burghs. Election of both by the qualified inhabitants is certainly assumed as the practice at the time of the passing of the Act of 1469. The Act decrees that both the council and its office-bearers shall be renewed annually in accordance with the ancient practice. But it deprives the burgesses of their elective rights, and invests the election of the new council in the old one, whilst empowering both, together with an elected representative from each craft, to choose the office-bearers—alderman, bailies, dean of guild, treasurer, etc. The reason adduced for thus discarding the popular vote is the "great trouble and contention through the multitude and clamour of the commons," who are described as "simple

[14] "Acts," i. 492.
[15] "Leges Burgorum," 35.
[16] See Innes, "Early Scotch History," 156-157.
[17] *Ibid.*, 81.
[18] "Laws of the Guild," 80-81.

persons," and are apparently regarded as unfit to exercise the franchise. Of popular disturbance on these occasions there is some trace in previous legislation. An Act of James I., for instance, disallows the election of deacons of the craft guilds and the guild meetings on the ground that these meetings tend to breed "conspiracies."[19] In an Act of the following reign we hear of "leagues and bands," "commotion and risings of the Commons in hindering of the common law" in the burghs.[20] Similar charges against the craftsmen and their deacons occur in subsequent reigns.[21] Evidently these communities were not always models of law and order in spite of their privilege of self-government, and this is hardly surprising in view of the lawless spirit of their baronial neighbours. They seem, indeed, to have been prone to take part in the feuds of these turbulent magnates, and the same Act contains a prohibition to enter into bands of "manrent," and "ride and rout in war array with any man" except the king and his officers or the burgh authorities.[22]

These internal conflicts seem also to have been due largely to the friction between the merchant guild and the craft guilds. As in the previous period, the merchant guild had continued to exercise a predominant influence in the government of the burgh. Its dean ultimately became an important official who had his court for judging in all matters and actions between the merchants of the burgh concerning merchandise, the procedure of his court being modelled on that of the towns of France and Flanders.[23] Its members were rather purse proud and jealous of their superior status and influential position. They sought to debar the craftsmen from any share in the privileges and advantages of their class, and to regulate work and wages in their own interests. We may rightly, I think, discern their influence in the undemocratic spirit of some of the

[19] "Laws of the Burghs," ii. 11-12 (1427). [20] *Ibid.*, 29 (1457).

[21] See *ibid.*, 32 (James III.); 51 (James IV.); see also "Extracts from the Records of Edinburgh," ii. 97-98; iii. 90 f., 122 f.

[22] *Cf.* a similar Act in the reign of James IV. *Ibid.*, 49 (1491); 56 (1503).

[23] "Ancient Burgh Laws," ii. 120.

Acts of Parliament of the period. No craftsman, for instance, may act as a merchant unless he renounces his craft.[24] Only men of substance, who are the owners of a certain quantity of goods, may engage in the oversea trade.[25] None but a merchant may hold office within the burgh.[26]

This anti-democratic legislation naturally roused and nurtured the antagonism of the craftsmen, who combined to assert their rights against these petty merchant magnates, and opposed or ignored the Acts passed at their expense. The Act of James I. against the election of deacons and the meetings of the craft guilds, for instance, does not seem to have had any practical significance, for in subsequent reigns the deacons are found exercising their office and the crafts holding their meetings. In Mary's reign another attempt to repress them found expression in the Act of 1555, abolishing once more their right to elect their deacons, on the ground that they have abused their privileges and have been the cause of leagues and bands among themselves and between burgh and burgh, resulting in "great trouble in burghs, commotion, and rising of the queen's lieges in diverse parts." Perhaps we may see in this restiveness the influence of the new religious movement of the time as well as keenness in the assertion of their material interests. They are deprived of the right of private convention or making any statutes or regulations for their guilds, and placed under the direct jurisdiction of the magistrates and council, who are to choose visitors of the crafts to enforce the laws relating to them under the supervision of the magistrates.[27] The Act was so keenly resented that in the following and subsequent years letters under the Great Seal were issued suspending its application and restoring their rights and privileges. The reasons given for the suspension show clearly that the obnoxious Act was due to the hostility of the merchants to the craftsmen. It had, in fact, only aggravated "the discussions and contentions among our merchants and craftsmen dwelling in our

[24] "Ancient Burgh Laws," ii. 30; *cf.* 42.
[25] *Ibid.*, ii. 42.
[26] *Ibid.*, ii. 54.
[27] *Ibid.*, ii. 78-79.

burghs." To prevent the continuance of these, the Act is therefore practically annulled by royal authority.

The Act of 1469, decreeing the self-election of the Town Council, was not universally applied, and it was necessary to renew it in 1487.[28] Some of the burghs, in fact, long retained the old practice of election by the community. It was modified five years later by the enactment that four members of the old council should be annually chosen to sit in the new. That there was still, nearly three-quarters of a century later, much diversity in the mode of election is proved by an Act of the Convention of Burghs in 1552, which sought to bring about uniformity of system. The preamble tells of "the great variance in diverse and sundry burghs of the manner of choosing their officers." The elections are, therefore, henceforth to be modelled on that of Edinburgh. On the Wednesday preceding the Feast of Michaelmas, the provost, bailies, dean of guild, treasurer, and council for the time being shall meet in the Tolbooth and shall elect a new council to the number of twelve persons, seven of whom shall be the existing provost, four bailies, dean of guild, and treasurer. The remaining five shall consist of three merchants and two craftsmen, who together shall form the new council. On the following Friday the new and the old councils shall meet together and choose the candidates for the municipal offices. These candidates may include the provost, dean of guild, and treasurer for the time being, and three merchants, but not the bailies, unless by special nomination. Craftsmen are in no case eligible for nomination. Every candidate must, however, have been a member of council for one or two years. On the Tuesday next following, the election shall take place, beginning with the office of provost and proceeding *seriatim* with the others, the candidate having the most votes to be declared elected and sworn.[29]

The elimination of the popular element in the burgh administration does not seem, however, to have conduced to good government. The close corporation was no improve-

[28] "Ancient Burgh Laws," ii. 43.
[29] "Records of the Convention," i. 3.

ment in this respect on the popularly-elected council. The Act of 1487 speaks of "partiality and mastership" in the filling of offices to "the undoing of the burghs." Evidently this mode of election failed to secure the appointment of the "best and worthiest indwellers of the town." There was, in particular, maladministration of the burgh revenue, derived from what was known as the Common Good, and it was needful to enact in 1491 that it should be spent for the general welfare by the advice of the council and the deacons of the crafts, and that an examination of its disposal should be made annually in the Chamberlain's Court.[30] More circumspection was also desirable in the leasing of the town lands, fishings, ferries, mills, etc.,[31] and the vicious custom was, by the beginning of the sixteenth century, creeping in of transforming these leases into feus and thus practically alienating the burgh property. "Among the royal burghs of Scotland," to quote the "Report of the Commissioners on Municipal Corporations in Scotland," "Edinburgh appears to have taken the lead in the adoption of this ill-omened system in Scotland, and in the year 1508 the governors of the city had influence enough to obtain from the crown a general licence of improving and augmenting the burghal revenue by disposing of their common property in feu-farm and heritage. It was at the same time carefully provided by the charter that such alienations of the burghal lands should not be held to infer any *recognition* or feudal forfeiture of the rights of the burgh in respect that the royal consent thus declared had been conceded for the public good. This unfortunate example the other burghs of Scotland were not slow in following. Special grants or licences of subinfeudation were obtained by some; and, emboldened by such precedents, the magistrates of other burghs would appear to have at last acted on the supposition that the former restraints of the common law were relaxed, if not entirely abrogated, and that the alienation in feu-farm of the common property of burghs royal had become a part of their ordinary administration." [32]

[30] "Burgh Laws," ii. 50. [31] *Ibid.*, ii. 50.
[32] "Report," 13; *cf.* 282-283.

In 1535 this corrupt administration had evidently become a public scandal, and an Act of this year bluntly arraigns the corruption prevailing throughout the burghs. Provosts, bailies, and aldermen are accused of consuming for their own particular benefit the Common Good of the burghs granted them by the king and his predecessors. Only honest and "substantious" burgesses are, therefore, in future to be entrusted with these offices, and these officials must bring their account books to the Exchequer to be examined by the Lords Auditors, "so that all murmurs may cease on that behalf."[33] It seems, further, that the magistrates were in the habit of admitting new burgesses without the advice and consent of the council, and pocketing the fees instead of assigning them to the Common Good and spending them for the general benefit.[34] It appears, too, that the prevailing maladministration was, in part, due to the interference of powerful outsiders ("outlandsmen"), who succeeded in getting themselves chosen to offices within the burgh, or exerted undue influence in its affairs for their own benefit. Hence the additional Act in 1535, ordaining that "no man, earl, lord, baron, or other of whatever degree, about and adjacent neighbours to burghs, molest, trouble, or inquiet the provost, aldermen, bailies, and officers of burghs, and merchants thereof in using of their franchises, liberties, and privileges," under penalty of accusation and trial at the justice ayre on a charge (inquisition and dittay) drawn up by the justice-clerk.[35]

In addition to internal self-government, the burghs were organised in a federation for the maintenance of their common interests. The organisation of the Four Burghs with their general court at Haddington, under the jurisdiction of the chamberlain, still appears in the fourteenth century. With the loss of Berwick and Roxburgh to the English in David II.'s reign, Lanark and Linlithgow were added to Edinburgh and Stirling for this purpose.[36] The Court heard appeals from other burghs, and from the early part of the fourteenth century it was enlarged, according to an old

[33] "Burgh Laws," ii. 68-69.
[34] *Ibid.*, ii. 56 (1503).
[35] *Ibid.*, ii. 69.
[36] *Ibid.*, i. 191.

Act given by Skene, so as to include all the royal burghs from the Spey southwards.[37] In this enactment the term Parliament (*Parliamentum*) is applied to it, and the legislative as well as the judicial function is ascribed to it, the purpose of the meeting being "to treat, ordain, and determine all things concerning the commonweal of all the king's burghs." These burghs seem to have been conjoined with the Court rather than constituted an integral part of it, for the Chamberlain's Court of the Four Burghs continued to function throughout the fifteenth century. At all events, from the reign of James III. onwards, the Convention appears as a statutory body, constituted by Act of Parliament in 1487 to represent and act for all the royal burghs of both south and north, the commissioners of each being bound to appear at its meetings under penalty of fine for non-compearance. It was invested with legislative as well as deliberative powers, its function being "to commune and treat upon the welfare of merchants, the good rule and statutes for the common profit of burghs, and to provide for the remedy of the damage (scaith) and injuries sustained within them." [38] It was to meet annually at Inverkeithing, but this proviso does not seem to have been observed, and it usually met at Edinburgh.[39] In the early part of the sixteenth century its meetings ceased to be known as "the Parliament of the Four Burghs," and the chamberlain disappears as its president. By this time the Convention had absorbed the court, and though on several occasions it was convened by royal letters, it became customary to fix the time and place of next meeting at the conclusion of its deliberations, the provost of the burgh in which it met acting as president, or "moderator." [40]

In virtue of this statutory recognition, the burghs, in addition to representation in Parliament, thus acquired their

[37] "Burgh Laws," i. 156; "Records of Convention," i. 502.

[38] "Laws of the Burghs," ii. 44.

[39] Already, in the reign of James I., the Convention was by Act of Parliament ordained to meet at Edinburgh yearly. This law was repeated in letters patent by James II., "Charters and Documents Relating to the City of Edinburgh," 76-77.

[40] "Records," 31, 77.

own legislative organ. The Convention did not, however, represent the whole community of each burgh, or the burghs which did not hold of the crown. Here, again, the exclusive spirit of the merchant guild made itself felt. Representation was confined to the merchant class, and anyone not belonging to this class, who had managed to secure election as a member, was jealously excluded.[41] At the Convention of 1574, for instance, the commission of the Provost of Haddington, who was a cordiner, was disallowed on the ground that no craftsmen by the old Acts and ordinances ever had a right to a seat or vote, and the provost was directed to remove himself from the meeting.[42] Within this limit it evinced a laudable zeal in promoting the common welfare of its members. It strove to settle the recurring disputes between litigious burghs over their rights and privileges by nominating commissions of arbitration, and assisted every burgh engaged in a law suit, on the principle that the interest of one member of the Convention was the interest of all. It sought, too, to protect them from the oppressive encroachments of powerful neighbours. Hence the Acts frequently passed to maintain their common interest and rights: the Act of 1555, for instance, on behalf of those burghs which are "oppressed and greatly defrauded of their privileges and liberties by great men of the country tending to put them to utter decay." In such cases, "all the remainder shall support the same in counsel, gear, money, and if further need requires, as the law will."[43] Again, in 1574, the Convention is found ordaining that "if any free (*i.e.*, royal) burgh have ado in law, all the others shall fortify, assist, concur, and supply them in their lawful actions, as need shall require, so that for the increase of amity, love, and commonwealth of their estate, their lawful actions, liberties, and freedoms shall be tender and dear to the others. . . . And because of the common controversy and questions debatable amongst many of the burghs, whereby there is not only great hatred, contention, and strife, but also both time and goods spent in the law and otherwise—for remedy whereof it is found

[41] "Records," 25. [42] *Ibid.*, 30-31. [43] *Ibid.*, 12.

good to the said commissioners that all actions among burghs, not 'intended' or depending in the law, shall, before any process or plea, be proposed to the General Convention of burghs and the same amicably referred to three or four that shall be chosen by common consent to decide therein, and the parties obliged to abide at their deliverance." [44] In accordance with the Act, the Convention four years later proceeded against the burgh of Haddington, which had raised an action before the Lords of Session against Dunbar without first submitting the case to its arbitration.[45]

The scope of its administrative and legislative powers was far-reaching, covering not only the whole field of burghal administration, but the relations of the burghs with the Government and the Parliament and their commercial interests with foreign lands. "It defined," in the words of Mr Marwick, the editor of its "Records," "the rights, privileges, and duties of burghs; it regulated the merchandise, manufactures, and shipping of the country; it exercised control over the Scottish merchants in France, Flanders, and other countries in Europe, with which from time to time commercial relations existed; it sent commissioners to foreign powers and to great commercial communities, entered into treaties with them, and established the staple trade of Scotland wherever this could be most advantageously done; it claimed the right, independently of the crown, to nominate the conservator, and it certainly did regulate his emoluments and control his conduct; it sometimes defrayed and sometimes contributed towards the expenses of ambassadors from the Scottish Court to that of France and other foreign powers in matters affecting the burghs and the commonweal; it allocated among the whole burghs of the kingdom their proportions of all extents and taxes granted by the Three Estates of the realm; it adjudicated on the claims of burghs to be admitted to the privileges of free burghs, and to be added to its roll; it took cognisance of weights

[44] "Records," 34-35.

[45] *Ibid.*, 86-87; *cf.* 355-356, when the Act was re-enacted, 1591.

and measures; it submitted propositions to Parliament in regard to all matters affecting the interests of the country, and influenced to an incalculable extent the national legislation. In a word, it formed a complete and powerful organisation for the protection of burghal rights and privileges, and for the promotion of whatever the burghs conceived to be for their own interest and that of the country generally." [46]

There was friction not only between the merchant guild and the craft guilds. The latter were also keen to maintain the privileges of their craft against non-members, and strove to preserve their monopoly against such. Free competition was unknown in an age in which industry was strictly regulated for the benefit of exclusive associations, and the masters of the craft jealously maintained the interest of their class at the expense of non-associated tradesmen. Those who were unfreemen of the burgh (non-burgesses) were incapable of engaging in the recognised crafts, and even freemen who were not incorporated in a craft were debarred from this privilege. On this ground the Provost, Bailies, and Council of Edinburgh, for instance, inhibit at the instigation of the flesher craft a number of freemen and non-freemen of the town "from the operation of the flesher craft." [47] Again, in 1570, they debar any inhabitant of Leith from exercising a craft on the ground that Edinburgh had acquired the port from Logan of Restalrig in 1398, and that, therefore, Leith had not the status and rights of a royal burgh, which consist of "two things, the one in using of merchandise, the other in using of crafts, receiving of freemen thereto, choosing of deacons of crafts for examination of them that are admitted thereto that they be qualified, so that the lieges of the nation be not deceived of their occupations." [48]

The exclusive spirit of the crafts was not, however, due solely to class jealousy. The member of a craft guild, being necessarily a free burgess, was responsible for his share of the municipal taxes, and the unfreemen who practised

[46] Preface to "Records," 13.
[47] Marwick, "Edinburgh Guilds and Crafts," 60-61.
[48] *Ibid.*, 106.

a craft had therefore an advantage over the freeman in this respect. Here is another instance in which this is expressly stated. John Livingstone and Robert Lekprevik in 1580 complain to the Town Council of Edinburgh that "Robert Woodhouse, Englishman, being a foreign stranger and unfreeman, has this long time bygone usurped upon him the privilege of a free burgess by selling and binding of all kind of books within the freedom of this burgh, to the great hurt and prejudice of the said complainers, who are burgesses and freemen, who stent (pay taxes), watch and ward, and bear all other portable charges with the neighbours, which they are not able to do hereafter if the said Robert be suffered to continue in the said trade, and therefore desire him to be discharged of the same." [49] The Council decrees accordingly that the said Robert shall not bind any kind of books within the freedom of the burgh under penalty of the confiscation of these books.

The importance of the royal burghs, as one of the Three Estates of the Realm, was enhanced by the substantial contributions made by them to taxes imposed by Parliament for special purposes. They came under an obligation, for instance, to pay their share of the ransom of David II. in 1357.[50] Similarly, they undertook in the Parliament of 1424 to contribute the tax on their goods and rents for their quota of the ransom of James I.[51] In the reign of James III. there are frequent instances of such obligations. They agree to pay £1000 towards the expense of an embassy to Denmark to negotiate the marriage of the king,[52] of another to the Duke of Burgundy concerning the marriage of the king's sister,[53] of sending a force of 6000 men to France, of maintaining a garrison of 600 men in the town of Berwick,[54] of another embassy to treat of peace with the King of England.[55] Again, in the reign of James IV., they undertake to raise their share of the expense of an embassy to France and Spain in connection with the marriage of

[49] Marwick, "Edinburgh Guilds and Crafts," 122.
[50] "Ancient Laws of the Burghs," i. 194 f.
[51] *Ibid.*, ii. 3-4.
[52] *Ibid.*, ii. 31.
[53] *Ibid.*, ii. 33.
[54] *Ibid.*, ii. 38.
[55] *Ibid.*, ii. 40; *cf.* 44.

the king.[56] These taxes or contributions being sometimes decreed in Conventions which were not Parliaments in the full sense, the burghs, as one of the Estates of the Realm, were specially notified in such cases by an Act of 1503 and again in 1517 and on subsequent occasions, to be present by their commissioners and headmen.[57] The quota of all general taxation payable by them was one-sixth,[58] and the proportion of this quota payable by each was fixed by the Convention of the Royal Burghs, which regulated it in accordance with the state of trade in the several burghs for the time being.[59] To the provost and bailies was assigned the duty of seeing that the burgesses contributed their individual share under penalty of poinding or imprisonment.[60]

Compared with the royal burghs, the privileges of those of barony and regality were more limited. They were subject to their own overlord, and the amount of self-government which they attained depended on the will of the superior, secular or ecclesiastical, according as they held of a baron or a bishop or other prelate. "The varieties in this respect," to quote the "Report of the Commissioners on Municipal Corporations," have accordingly been very great; the superior in some cases retaining the appointment of burgh officers entirely in his own hands; in others, conferring on the inhabitants the right of electing their own rulers; but, in general, retaining over them a power of control which left to them, at best, a very precarious independence.[61] They were not entitled to engage in foreign trade, and there are numerous Acts in which the royal burghs attempted to prevent them from illegally participating in this privilege. They were not represented in the Convention, and thus did not exercise an appreciable influence on legislation and government.

In some of these non-royal burghs, however, as in the case of Glasgow, which was the seat of a bishop and was

[56] "Ancient Laws of the Burghs," ii. 46-47.

[57] *Ibid.*, ii. 56, 89; *cf.* Hannay, "Parliament and General Council," *Scot. Hist. Rev.*, vol. xviii. 167-168 (1921).

[58] *Ibid.*, ii. 109.

[59] *Ibid.*, ii. 142.

[60] *Ibid.*, ii. 89.

[61] "Report," 20.

raised into a burgh of regality in the reign of James II., the burgesses seem to have enjoyed privileges practically equivalent to those of the royal burghs, though their status and rights were inferior to those of the latter. Sir James Marwick infers that under their episcopal superior the burgesses of Glasgow enjoyed "a considerable amount of civic liberty." "While they held their property and rights from the bishop as subject superior and were bound to render him rents and dues, which, in the case of the royal burghs, were given to the sovereign, they might, as long as they fulfilled their obligations to him, effectually maintain their rights as burgesses. The magistrates of the burgh were no doubt subject to his appointment and dismissal; but there is no evidence that, at any time, this power of appointment was harshly exercised, or the power of dismissal enforced at all." [62] In the charter of James III. confirming the rights and privileges of the Bishop of Glasgow, the right to appoint and control the magistrates and officers of the burgh is explicitly stated, and in respect of this right Glasgow was in an inferior position to the royal burghs. "But," adds Sir James, "it is not to be overlooked that for a long time previously the burghal code applicable to royal burghs, with all the rights and advantages which that gave the burgesses, had been in operation in the city. Besides, it may well have been that the powers which the charter conferred on the bishop were really more formidable in theory than in practice. Be that as it may, it will be seen that if these powers were ever put in operation, important relaxations of practice were speedily introduced." [63] Moreover, we find Glasgow a member of the Convention long before it was created by James VI. in 1611 a royal burgh, with all the rights and privileges thereto belonging, but saving those of the archbishop.[64] There was, in fact, an increasing tendency on the part of the unfree burghs (of barony and regality) to secure the privileges of their free, or royal rivals, especially in the matter of foreign trade, and they might apply for this recognition. But it was not till

[62] "Charters Relating to the City of Glasgow," i. 29.
[63] *Ibid.*, i. 37. [64] *Ibid.*, ii. 278-283.

the second half of the seventeenth century that they succeeded in obtaining this coveted privilege on condition of paying their share of the taxation to which the royal burghs were liable.[65] By the Act of 1587 annexing the temporalities of benefices to the crown, as a consequence of the Reformation, the burghs of barony and regality which had held immediately of the prelates of the old Church, became immediately subject to the king, who, besides confirming their ancient rights and privileges, recognised the right to elect annually their provost and magistrates. Besides, Glasgow, Dunfermline, Queensferry, Culross, Fortrose, Dysart, and probably St Andrews and Arbroath were erected into royal burghs, whilst others remained without representation in Parliament.[66]

[65] Davidson and Gray, "The Scottish Staple at Veere," 213 f.
[66] "Report of Committee on Municipal Corporations," 97.

CHAPTER VI

THE CHURCH AND ITS CONSTITUTION

In the previous period the constitution of the Church had, as we have seen, gradually taken shape in the establishment and extension of the feudal ecclesiastical hierarchy and of the episcopal or consistorial courts for dealing with ecclesiastical suits, the Provincial Council for the deliberation and legislation of measures affecting the whole Church, and the diocesan synod which dealt with those of particular dioceses. These features of the ecclesiastical constitution survived, with some modifications, throughout the present period until the old constitution was displaced by that of the Reformed Church. The most important modifications were the inclusion of the clergy in the national Parliament as one of the Estates of the Realm and the introduction of the archiepiscopal dignity, carrying with it the presidency of the Provincial Council and the right to hear appeals from the bishops' courts, in the second half of the fifteenth century. The inclusion of the clergy in the national Parliament was hardly an innovation, since the bishops and higher clergy had, along with the nobility, formed an integral part of the feudal Council of the earlier period. At the same time it gave to the Church a recognised place under the more developed parliamentary constitution along with the barons and the burghs. The other modification—the creation of the function of archbishop—was a new departure.

Another feature of the constitution of the earlier period—the intimate relation of the Scottish Church to the papacy—is also characteristic of this period. The Church continued to be "the special daughter" of the Roman Church, which Pope Clement III. had declared it to be in 1188, subject to no alien jurisdiction but that of the popes, in spite of repeated attempts on the part of the Anglican Church to infringe its independence. There were, indeed,

times of friction with Rome, and at the beginning of the period, during the reign of Robert I., pope and king were at variance over the question of Scottish independence of England until John XXII. at last accorded the recognition which, under hostile English influence, had been denied. During the great schism, Scotland, partly in deference to French influence, took the side of the antipopes. In the reign of James I., in the early part of the fifteenth century, there was again acute friction between the pope and the king, which threatened a serious rupture, and the Scottish Church again sided with the antipapal opposition at the Council of Basle, which eventuated for a time in a new schism. The abuse of the papal régime in the matter of Scottish ecclesiastical patronage led to farther friction between the papacy, the king, and Parliament throughout the second half of the century, comparable to some extent to that which had rasped the relations of the English crown and the pope in the fourteenth. Again, after Flodden, the bitterness against the papal policy in supporting the English enemy aroused for the time being a keen antipapal reaction which threatened a schism from Rome. But this periodic strain did not imply any set policy of antagonism in principle to the papacy, and despite this occasional restiveness under the papal jurisdiction, the ecclesiastical allegiance of the Scottish Church and nation from the War of Independence to the Reformation was not seriously questioned till the reign of Queen Mary, which witnessed the uprising of the people under the attack of the Reformers against the pope as Antichrist. Scotland was not materially affected by the antipapal movement in England which found such active expression in the English Parliament and through Wyclif in the fourteenth century. It produced no Wyclif to lead the revolt within the Church against a secularised papacy, though there are some traces of Lollardy north of the border in the fifteenth century. It was not till the early sixteenth that the rampant declension of the Church provoked a growing and ultimately triumphant revulsion from the papal system which ended in the complete subversion of the old ecclesiastical constitution.

As we have seen, the papal concession in the early

thirteenth century of the right to hold Provincial Councils under an elected president or conservator assured self-government to the Scottish Church under the direct jurisdiction of the pope. This concession invested the Council with the corporate supervision of the whole Church, including the power to enact statutes and apply the statutes of General Councils for the correction of abuses and the maintenance of the canon law. As thus constituted, the Council might have developed into an effective organ of the corporate action of the Church. In the thirteenth century it seems to have fairly fulfilled the promise of its inception, to judge from the considerable body of statutes which belong to this century. It served the purpose of bringing corporate influence to bear on the Government, as the feudal Council did, in the case of the State. It furnished a bond of union between the dioceses and also the various ranks of the clergy. It was the nearest approach which the Middle Ages produced to a democratic ecclesiastical assembly, since it recognised episcopal parity, elected its president from their number, and at the same time conjoined with the bishops and abbots, representatives of the lower clergy, in the general government of the Church. From the War of Independence, however, its record as a distinctive constitutional organ of the Church is not very intrusive. Its legislative activity, as far as recorded, is negligible before the storm of the Reformation roused it into a belated but hopeless activity in the effort to stave off the inevitable Nemesis by remedial legislation. During the 335 years of its existence, from 1225 to 1560, only a comparatively meagre list of enactments—about 300 in all—stands to its credit, even if we include those passed by diocesan synods, and nearly one-half of them belong to the ten years preceding the establishment of the Reformed Church in 1560. The greater part of the remainder belong to the thirteenth century. Even so, they are borrowed largely from external sources—from the decrees of the General or Provincial Councils of the Church at large, or diocesan synods and enactments of individual bishops, particularly of English synods and bishops.[1] "No

[1] Patrick, "Statutes of the Scottish Church," Introduction, 51 f.

national Church," says Dr Patrick, "ever depended so largely on other provinces as did our Scottish one. So many of the statutes can be traced, in whole or in part, verbatim or in substance to other conciliar decrees, œcumenical, provincial, or diocesan, or to the constitutions of individual bishops, that, where we fail to discover the original, we are inclined to believe the Scottish legislators were nevertheless following some extant original. The most singular fact (in view of the hostility between the two nations) is that so much of Scottish canon law was borrowed direct from England." [2]

At first, its meetings seem to have been annual. But from the fourteenth century they become intermittent, to judge from the infrequency of the notices of them in the chroniclers. Probably the deliberations of the Council were not ordinarily of sufficient interest to attract the attention of these scribes, and this lack of interest may explain the omission to record its meetings. But even in the case of some of those recorded, it appears that they were really diocesan synods which have been mistaken for Provincial Councils. The appearance of the Council in the national history may, in fact, be described as rather furtive, and for over sixty years, from 1470 onwards, it does not appear at all [3] and was evidently moribund. The disasters of the second half of the reign of James III. and the lengthy minority of James V., together with the rivalries and contentions of the Archbishops of St Andrews and Glasgow in the reigns of James IV. and V., seem to account for this long quiescence. Throughout the greater part of the whole period it does not seem to have been an appreciable force in the direction of ecclesiastical, not to speak of national affairs, or in the maintenance of ecclesiastical discipline and the spiritual life of the Church. Its legislative scope was narrow, its vision and grasp of policy weak. It deals largely with abuses which it appears to have been impotent effectually to remedy, though its reforming intention is laudable. There is little to suggest practical initiative or intellectual and religious outlook beyond the conventional

[2] Patrick, "Statutes of the Scottish Church," Introduction, 52.
[3] Robertson, "Statuta Ecclesiæ Scot.," i. 109.

interests of a routine piety. Only in the later legislation is there any perception of the demands of a higher statesmanship, of an insight beyond the mere surface of conventionality, and even then the impression is that of helplessness and incompetence to conceive or adopt effective measures. This is the impression all through, though we must make allowance for sparse information, and also for the spirit of the age. But surely, if its deliberations had been concerned with great ecclesiastical questions or vital religious interests, more would have been heard of its proceedings. Its voice seems to have been ignored in the settlement of the great question of the schism, for instance, which was discussed and settled in the Parliament which met at Perth in 1418, as if the distinctive assembly of the Church had no concern with such a far-reaching problem as the restoration of ecclesiastical unity under a universally acknowledged head, which it was the main business of the Council of Constance to settle.

One source of its weakness lay in the fact that it had no appellate jurisdiction, though during the schism this was temporarily conferred on it by Act of Parliament in 1401.[4] Ordinarily, appeals could only be taken to Rome, and this incentive, which carried so many suits to the curia, was lacking to excite a keener interest in the Council. Moreover, it was overshadowed by the Parliament, in which the higher clergy had their place as an Estate of the Realm. They could find in this assembly more scope for the exercise of influence or ability in the service of the State and the Church alike, and they had also open to them some of the great offices of State, such as the chancellorship, in which to give scope to their ambition or their aptness for business. Parliament, in virtue doubtless of the fact that it represented the Church as well as the nation, legislated for both. It seems to have regarded the Council rather as a supplementary than an independent organisation, and it ultimately assumed the right to direct it in the application of its ecclesiastical legislation. It was an anomalous institution in the Church at large as far as its constitution recognised episcopal parity

[4] "Acts," i. 576.

and sanctioned the election of a president, and though this might be an excellent feature, it was not fitted to increase its prestige or influence within the universal system of graded ecclesiastical authority prevalent elsewhere. Its efficacy depended on how it was worked, and between the Parliament on the one hand, and the exercise of the papal power on the other, which cut so deeply into church life by means of the provision to benefices and the right to receive and decide appeals, its actual legislative and administrative efficacy was as a rule of limited validity. The corruption that prevailed in the curia throughout so large a part of the period would have paralysed any body whose members were dependent for their benefices and for the issue of appeals in ecclesiastical suits on the mercenary and unscrupulous set of officials that dominated the Roman court.

The difficulty and cost of carrying appeals to Rome led to attempts to provide a competent authority to hear and decide these in Scotland. Though Honorius III. had conceded the right to hold Provincial Councils, he refrained, apparently out of deference to the claim of the Archbishop of York to jurisdiction over the Scottish Church, from creating a Scottish archbishop to convene and preside over it, as in the case of the Church elsewhere. For the same reason his predecessor had declined 100 years earlier (1125) the request of David I. to erect the See of St Andrews into an archbishopric.[5] The renewal of the request by David's grandson, Malcolm IV., was again declined.[6] The archiepiscopal function would have carried with it the right to hear appeals from the episcopal courts as well as preside over the Provincial Council, and the practice of appeals to Rome remained without redress, though it was lessened to some extent by the occasional presence of a papal legate, or the nomination of a commission of Scottish bishops with power to deal with such suits. Towards the end of the fourteenth century (1386) Walter Trail, Bishop of St Andrews, sought to remedy this grievance by obtaining from the antipope, Clement VII., the "faculty" to hear and decide first appeals on the ground of their frequency,

[5] "Statuta," i. 24-25.

[6] *Ibid.*, i. 29-30

the delay in securing justice, and the consequent tendency of suitors to seek a remedy from the secular power. The bishop was, therefore, empowered finally to decide such appeals from the Scottish bishops and other ecclesiastical judges, and to invoke, if necessary, the aid of the secular arm.[7] The faculty was, however, only personal to the Bishop of St Andrews, and an attempt was made, apparently without reference to pope or antipope, to invest the Conservator of the Provincial Council with this power: in the case of the filling of the vacant priory of Urquhart in 1388 by the Bishop of Moray, for instance, when an appeal was brought by a disappointed candidate before Trail as conservator for the time being. It does not seem to have been deemed competent to do so, and the case was taken by the clerical Estate to the king in Parliament, which decided in 1391 against the appellant.[8] The necessity of instituting a competent ecclesiastical authority for the purpose was, however, so clamant that Parliament, as we have noted, with the consent of the clerical Estate, recognised ten years later (1401) the right of appeal, in the case of an unjust sentence of excommunication, from the bishop's court to the conservator, and from the conservator to the Provincial Council during the continuance of the schism.[9] This looks like the ascription of a virtual metropolitan jurisdiction to the conservator over the other bishops. But it was only a temporary expedient, adopted by Parliament without apparently any reference to the antipope who was a prisoner at Avignon, and whose prerogative it was to grant such jurisdiction, and it hardly bears out the contention of Thomas Innes that it virtually conferred on the conservator the power of a metropolitan.[10]

During the fifty odd years from 1418, when Scotland renounced its allegiance to the antipope, to 1472, the question of a metropolitan seems to have slumbered, and the ultimate institution of this function was due, not to the expressed will of the Scottish Church, but to the ambition and the individual efforts of Patrick Graham, Bishop of

[7] "Calendar of Papal Registers," iv. 252-253.
[8] "Acts," i. 578; *cf.* "Statuta," i. 51-52.
[9] *Ibid.*, i. 576.
[10] "Statuta," i. 52.

St Andrews. Graham was an expert in the art of buying benefices at Rome, and had acquired by the usual payments the Abbey of Paisley and the Priory of Pittenweem *in commendam*, besides the bishopric in 1466. The reasons adduced in the Bull creating the See into an archbishopric, which in 1472 he succeeded in obtaining from Pope Sixtus IV., are, however, sufficiently substantial to justify the application apart from the personal motives which may have co-operated towards it. Under the dominant mercenary system which governed such transactions on the part of the curia and the applicant alike, we cannot accept these documents at their face value. Ecclesiastical profession was merely the formula of vesting the transaction in appropriate make-believe in the case of popes like Sixtus IV. But there could be no doubt about the difficulty and expense of carrying appeals from so distant a country as Scotland to Rome, the consequent tendency to bring them before a secular court (*ad forum vetitum deduci*), the evils resulting therefrom, the ancient renown of the See of St Andrews. All this, as stated in the Bull, was true enough, whatever secret motives lay behind it, and sufficiently justified the resolution to invest the Bishop of St Andrews in the metropolitan power.[11]

The Bull subjected the Scottish bishops, including those of Man and Orkney, as suffragans of the new archbishop. It had, however, been obtained without the approval or sanction of the king and the bishops, and it excited the keen opposition of both. The bishops especially were not minded to become the inferiors of one of their own number, and contributed a large sum in support of an appeal against the obnoxious transaction.[12] Their enmity and the royal resentment led to the investigation by a papal commissioner of the charges preferred against him, and on the strength of the commissioner's report the pope deposed him in January 1478 and decreed his confinement in a monastery. In view of the hatred of his enemies, it is difficult to believe

[11] Bull in "Statuta," i. 110-111. It is doubtful whether the pope also conferred the title and function of *Legatus a latere* on the new archbishop. See Herkless and Hannay, "Archbishops of St Andrews," i. 51-52.

[12] Leslie, "History," ii. 91-92.

that the Bull is a judicial statement of his guilt, and, in part at least, it certainly makes the impression of transforming calumny into crime.[13]

Whilst his enemies succeeded in ruining him, they did not succeed in depriving St Andrews of its metropolitan status, and a succession of archbishops followed up to the Reformation. Its elevation was increased by the grant of the primacy and the rank of *legatus natus* to Graham's successor, Archbishop Schevez, by Pope Innocent VIII. in 1487, with the same rights and honours as the Church and Metropolitan of Canterbury.[14] This increase of dignity provoked another protest—this time on the part of the Bishop of Glasgow, whom the pope sought to propitiate by an exemption from the jurisdiction of the Archbishop of St Andrews. But Glasgow would not be content with less than metropolitan rank, and the persistent support of king and Parliament [15] at length moved the pope in 1492 to erect it into a second archbishopric, with Dunkeld, Dunblane, Galloway, and Argyll as its suffragans, and exemption during the lifetime of Archbishop Blackader from the jurisdiction of the Scottish primate, but without primatial or legatine rank.[16] The constitution of two metropolitan Sees was, however, a questionable boon, and gave rise to recurring strife and suits at Rome between the two rivals up to the establishment of the Reformation.[17]

Throughout the period the Church appears in close relation with the State. This interdependence was an essential feature of the feudal Constitution, under which the clergy formed an Estate of the Realm and, through the Parliament, exercised a corporate influence on legislation. Members of the episcopate, from Bishop Lamberton to Cardinal Beaton, also played an active part as high officers of State in the direction of policy and administration.

[13] See the Bull in "Statuta," i. 116.

[14] *Ibid.*, i. 118-119.

[15] The Act was passed by Parliament in favour of erecting the See into an archdiocese in 1489, ii. 213.

[16] "Statuta," i. 122-123.

[17] For details of this continued strife, which is rather petty and unedifying, see "Statuta," i. 123 f.; *cf.* relative Acts of Parliament in "Acts," ii.; and Herkless and Hannay, "Archbishops of St Andrews."

Moreover, under the feudal Constitution, the prelates—bishops, abbots, priors—held their temporalities as vassals of the crown, subject more or less to the obligations inherent in the feudal tenure. As vassals they were the dependents of the crown and bound to render homage and fealty, as in the case of all lay tenants in chief. The clergy might enjoy certain immunities which the feudal system recognised as the rights and privileges of their order. They were, for instance, exempt from the jurisdiction of the secular courts, and the bishop, like the lord of regality, was entitled to "repledge" a cleric accused of crime from the jurisdiction of the justiciar, or the sheriff, for trial in his own court.[18] These rights and privileges were in principle recognised by the State, which appears as the protector of the Church, and in every reign, from that of Robert I. onwards, Parliament consistently passes Acts guaranteeing the freedom of Holy Kirk. The phrase meant freedom from lay encroachment on the rights and privileges enjoyed by the clergy as a body. It did not mean the independence of the Church from the State, which under the feudal Constitution was an impossibility. Not only was their co-operation as an Estate of the Realm essential to legislation; they were liable for their share of taxation and for the feudal obligation inherent in the tenure of their temporalities. Moreover, the crown claimed and exercised, directly or indirectly, a voice in the filling of vacant Sees and other benefices, and in this way possessed an additional control of the ecclesiastical order. On this, as well as on other grounds, the crown was a factor to be reckoned with by the pope as well as the clergy in the government of the Church, and the tendency of crown and Parliament was to make their influence felt in this sphere in increasing measure throughout the period. In the fifteenth and early sixteenth centuries, in particular, we discover a striving to accentuate the subordination of the Church to the State, to limit the freedom of Holy Kirk in the interest of the crown, in spite of the conventional enactment of its rights and privileges, to make the Parliament the supreme legislative power for the Church

[18] See Hume, "Commentaries on the Law of Scotland," i. 8-10.

as well as the State. The result of the policy of subordinating the former to the latter was friction with the pope, which in the fifteenth and early sixteenth centuries became very acute at times on purely ecclesiastical as well as political grounds.

In the fourteenth century there is little trace of the antagonism between the pope on the one hand and the crown and Parliament on the other which rasped the relations of England and the papacy and produced a series of antipapal enactments in the repeated Statutes of Provisions and Præmunire. These antipapal statutes were largely due to political motives, England being at war with France, and the popes at Avignon, as Frenchmen, being amenable to anti-English influence. In Scotland, on the other hand, such motives were, after the War of Independence, inoperative, Scotland being the ally of France, and therefore disposed to be pro-papal as well as pro-French. There was accordingly less restiveness on account of the abuse of the provision of papal nominees to Scottish bishoprics and other benefices in fourteenth-century Scotland than in England during the same century. As we have noted, the Scottish bishops in the early feudal period were elected by the cathedral chapters with the assent of the king and confirmation by the pope. The principle of free election was, however, gradually infringed by the popes who, by the early part of the fourteenth century, "provided" their nominees to Scottish Sees, the rights of the chapters and the king receiving little more than formal recognition. In 1328, for instance, Pope John XXII. appointed the archdeacon of St Andrews to the See in succession to Bishop Lamberton without even awaiting any so-called election by the chapter.[19] There was some restiveness at the growing encroachment on the rights of chapters which was afterwards voiced by Bower in the "Scotichronicon" in the fifteenth century.[20] But there was little active opposition to these episcopal "provisions," and Bower relates as a matter of course a series of appointments to the See of St Andrews (W. Landels, Walter Trail, Hen. Wardlaw) in

[19] "Calendar of Papal Registers," ii. 270, 282.
[20] Lib. vi. Chap. 45.

the fourteenth century "by provision of the pope." The pope is found, too, in this century "providing" to lesser benefices in lavish fashion without consideration for the rights of patrons, even though the provision might be in favour of foreigners who drew the revenue of the benefice without discharging its functions. He is also found giving his sanction far too readily to the holding of pluralities, even in the case of what were known as "incompatible benefices," *i.e.*, charges situated in various districts, the duties of which the holder could not possibly personally perform. Needless to say, these questionable transactions had to be paid for at Avignon or Rome, where corruption and trafficking in benefices reigned supreme in the fourteenth century. Even so, little is heard of resistance or protest from the Scottish Church or Parliament. Scotland in the fourteenth century was loyal to the papacy, if during the schism it professed allegiance to the antipopes. Dr M'Ewen is of opinion that its allegiance was dictated by resentment at the extortionate methods pursued by the popes of the Babylonish captivity at Avignon.[21] Probably the Franco-Scottish Alliance had a good deal to do with the preference for the popes supported by France. At all events, though it cleaved to Benedict XIII. even after France and other nations had renounced him, it was not antipapal on principle. Parliament, indeed, by the Act of 1401, conferring on the Provincial Council the final determination of appeals, practically abrogated the papal jurisdiction in Scotland. But the Act was rendered necessary by the ecclesiastical confusion resulting from the schism. It was only a temporary expedient, and was not actuated by hostility to the papacy in itself. When the Council of Constance disowned John XXIII. as well as the two antipopes and elected Martin V. as the only legitimate pope, the Scottish Parliament, assembled at Perth in October 1418, voted for acquiescence, in spite of the preference of the Regent Albany and the reasonings of the English friar Harding for Benedict XIII.[22] The Church Catholic had again an undisputed head.

[21] "History of the Church in Scotland," i. 288.

[22] "Scotichronicon," lib. xv. Chaps. 24, 25.

But it had not obtained an adequate guarantee of reform, of which, in virtue of the accumulation of evils from the Babylonish captivity and the great schism together, it stood in extreme need. With the advent of James I. in 1424 there appears a set determination on the part of the forceful king both to assert the power of the crown over the Church and to deal severely with the abuses rampant within it. To this end he made use of Parliament rather than the Provincial Council, which, as we have noted, had not been consulted on the question of ending the schism, the Estates arrogating the right to debate and decide it. James's reign, indeed, is remarkable for the drastic attempt to reform the Church as well as the State by the assertion of the royal will by means of the Parliament. The acquiescence of the fourteenth century in the papal régime was at an end, and henceforth the crown, acting through the Parliament, becomes less compliant in the matter of papal provisions and papal claims, and less considerate in its attitude towards the freedom of Holy Kirk. It professes, indeed, to champion the freedom of election by the chapters, and adduces the material detriment to the kingdom in justification of this aggressive policy. This last argument was a forcible one and merits due weight, for the material welfare of the kingdom did suffer gravely from the drain of its money Romewards. But the crown was ready enough to countenance unconstitutional and injurious practices when they accorded with its own interests, and the main motive of the antipapal policy of the fifteenth century is the desire to strengthen the control of the crown, or the faction which for the time being wielded the power of the crown, over the Church. Hence, in part at least, the Acts against papal provisions and appeals to Rome and other measures bearing on ecclesiastical matters, which appear in the statute book in this century.

The reforming initiative of James I., as expressed in such Acts, assumes, on the part of the State, a large measure of ecclesiastical jurisdiction. In 1424 the king and Parliament forbid any cleric to pass himself, or send procurators for him overseas (to Rome) without leave of the king, and requires all clerical travellers abroad to state to the

chancellor the cause of their journey and the amount of money they carry with them.[23] It further forbids clerics to purchase in the Roman curia pensions out of any benefice, secular or regular, under forfeiture of the sum in question.[24] In the case of the purchase of a pension out of the Deanery of Aberdeen, Parliament declares such practices, which tend to the dismembering of benefices, to be an infringement of the common law and against the interests of the kingdom, and the king, at its instance, commands the delinquent to proceed no farther, and the Bishop of St Andrews, the judge delegate in the case, to stay process till his majesty has communicated with the pope.[25] It even takes upon itself to require the bishops to make an inquisition on the subject of heresy in order that the Church may be purified from heresy and Lollards be punished in accordance with the laws of Holy Kirk.[26] Another Act is significant of the tendency to supervise the procedure of the consistorial courts, in reference apparently to a deliverance of the Provincial Council five years before (1420) on the law and practice to be observed in testamentary causes.[27] This Act reveals the striving to limit the law applicable in the ecclesiastical courts in accordance with the law of the land. Hence the enactment "that all and sundry the king's lieges of the realm live and be governed under the king's laws and statutes of his realm alone and under no particular laws or special privileges, or by any laws of other countries or realms."[28] It requires the bishops in their diocesan synods to direct that their clergy offer prayers for the king, queen, and their children.[29] Moreover, it encroached so far on the jurisdiction of the ecclesiastical courts as to regulate their procedure in the interest of poor lay suitors against clerical delinquents, and thus lessen the expense and trouble in obtaining justice. Not only so, but it directed that this statute should be forthwith enacted by the authority of the Provincial Council.[30] It amplified the statute anent the passage of clerics to Rome, binding them to show to the

[23] "Acts," ii. 5, 14.
[24] *Ibid.*, ii. 5.
[25] *Ibid.*, ii. 6.
[26] *Ibid.*, ii. 7.
[27] "Statuta," ii. 77-78.
[28] "Acts," ii. 9.
[29] *Ibid.*, ii. 10.
[30] *Ibid.*, ii. 14 (1427).

satisfaction of the chancellor that they have good and honest cause for their journey, and to give their word of honour that they intend no "barratry," *i.e.*, corrupt trafficking in benefices.[31] In this legislation the Parliament was merely the instrument of the forceful will of the king, who himself issued injunctions in his own name to the bishops and higher clergy in things ecclesiastical. Witness his letter to the Bishop of St Andrews, commanding him "with all possible celerity to recover the possessions of his see which his predecessors had unjustly alienated."[32] Similarly, the letter to the abbots and priors of the Orders of St Benedict and St Augustine in Scotland, enjoining them to rouse themselves and reform their religious houses which had declined so scandalously from the observance of their rules, and threatening compulsion in case of refusal or remissness.[33]

This legislation shows clearly the policy of increasing the royal control over the Church as well as effecting a necessary reformation. In the pursuit of this policy the king was staunchly abetted by John Cameron, his energetic secretary, who became Bishop of Glasgow in 1426 and Chancellor in the following year. It had at least the formal assent of the clergy as an Estate of Parliament, and in several instances this assent is specifically given, the Act purporting to be made by the clergy alone. But it aroused the resentment of Pope Martin V., who regarded it as an infringement of the liberty of the Church and the rights of the Holy See, and gave expression to his resentment by instituting proceedings against the Bishop of Glasgow. He accused him, as the instigator of these measures, of various crimes which, he held, invalidated his promotion to the bishopric of Glasgow, and appointed a commission to investigate. On the strength of its report he cited him to Rome to be deprived of his See. James sent two ambassadors to protest against these proceedings on the ground that many of the charges were untrue, and to promise amendment on the bishop's behalf if it were found that he had done anything amiss. The ambassadors further promised, it appears,

[31] "Acts," ii. 16. [32] "Statuta," i. 89. [33] "Acts," ii. 25-26.

that the bishop would undertake to bring about the repeal of the obnoxious statutes, and the pope, in consideration of this concession, agreed to annul the sentence of excommunication (May 1430).[34] Cameron was, however, not disposed to implement this promise, and the pope thereupon sent William Croyser, Archdeacon of Teviotdale, and a member of the papal household, as his nuncio to cite the bishop anew to Rome. James promptly declared the archdeacon a traitor, and deprived him of all his benefices. The archdeacon fled before the storm, and the pope, now Eugenius IV., retorted by annulling the royal proceedings, restoring Croyser's benefices, and ordering the king to make restitution on pain of excommunication [35] (February 1436). James then thought best to temporise, and requested Eugenius to send another nuncio to negotiate an agreement.[36] His murder intervened in the following February (1437) before an accommodation could be reached, and though the pope subsequently absolved Cameron, the nuncio did not succeed in obtaining the repeal of the obnoxious legislation which had originated this lengthy conflict.[37]

The influence of this quarrel with the pope is observable in the antipapal attitude of the Scottish envoys sent by the king in 1433 [38] to the Council of Basle, which attempted to vindicate against the pope the principle of the supremacy of a General Council in the government of the Church. The leader of the embassy, the Abbot of Dundrennan, took an active part in the opposition to Pope Eugenius IV., and was one of the prelates entrusted with the task of electing the antipope, Felix V., in 1439. Felix had not a

[34] "Calendar of Papal Registers," vii. 18-19.

[35] *Ibid.*, viii. 233-235, 261, 286-287. Cameron appears to have been at Bologna in 1436 to negotiate an accommodation without effect, *Ibid.*, 229.

[36] *Ibid.*, viii. 288.

[37] Robertson ("Statuta," i. 82 f.) ascribes the papal action to resentment at the statute of 1427, directing the Provincial Council to legislate the Act of Parliament referring to suits in ecclesiastical courts. It is, however, evident from the Papal Registers, that the legislation against trafficking in benefices at Rome was a chief cause of offence.

[38] "Statuta," ii. 247-248.

few supporters in Scotland,[39] and for some years there were strife and division in the land till the Parliament in 1443 declared in favour of "our holy father the Pope Eugene."[40] James II. was less aggressive than his father in his dealings with the Church, and gratified the Scottish prelates by renouncing the right to appropriate the personal estate of a deceased bishop, whether he left a will or not. This right, though based on feudal law, had long formed a source of friction. The Church had submitted unwillingly to this grievance, and in the middle of the thirteenth century the Bishop of St Andrews had obtained a papal Bull prohibiting the practice. The prohibition was, however, subsequently withdrawn, and fully 100 years elapsed before the Scottish bishops succeeded in obtaining from David II. the renunciation of the right. Though the renunciation was confirmed by Robert II., it was not carried into practice by the royal officials, and in 1373 Pope Gregory XI. denounced excommunication against those who presumed to disregard it. It was not till the middle of the fifteenth century that, in response to a petition of the bishops, the Three Estates, assembled at Edinburgh in January 1450, conceded the redress of this grievance, and James II., in accordance with their decree, granted a charter conferring on the prelates the right to dispose by will of their personal property, with the additional concession that the fruits of the deceased bishop's mensal churches and all emoluments pertaining to his spirituality should be administered by the vicar-general during the vacancy, and the proceeds handed over to his successor.[41]

On the other hand, James strenuously maintained the ancient claim of the crown to appoint to benefices falling vacant in a diocese during an episcopal vacancy, and this claim, along with the abuse of papal provisions, led to a renewal of friction with the pope towards the end of his reign. In return for his concession to the bishops, the Provincial Council, assembled at Perth in 1457 and 1459,

[39] "Calendar of Papal Registers," viii. 238.
[40] "Scotichronicon," lib. xvi. 6; "Acts," ii. 33.
[41] "Acts," ii. 37-38; *cf.* "Statuta," i. 100-106.

after investigation, gave its support to the crown.[42] The contention was undoubtedly supported by ancient practice, which recognised the right of the king to present to benefices falling vacant during the interval between the death of a bishop and the rendering of fealty and homage by his successor. It had been recognised by the popes till the beginning of the fourteenth century, when John XXII. contested it. James II. handed on the task of vindicating this claim to his successors, and during the reigns of James III. and IV. friction with the pope over this question reached a very acute stage. It was intensified by the royal claim to a voice in the appointment to vacant bishoprics, by the abuse of papal provisions, of appeals by clerical suitors, and extortionate papal taxation. Hence the repeated enactments in remedy of these grievances. That of 1462 asserted the right of the king to appoint to benefices during a vacancy in the See, and inhibited any cleric from seeking at Rome to obtain such benefices by way of "expectative graces," or papal "reservation," under penalty of forfeiting the benefice so obtained in contravention and contempt of the royal right.[43] That of 1466 prohibits the holding or purchasing of benefices *in commendam*, or buying pensions, within or without the realm, out of a benefice without the consent of its holder, under the same penalty.[44] These practices continued, nevertheless, and the evil was aggravated by the papal claim to appoint to any benefice, and not merely to those reserved to the pope. These appointments had, of course, to be paid for, and in view of "the inestimable scaith and damage" to the realm, in consequence of the draining of its wealth for this illegal purpose, Parliament is again found in 1471 legislating against the purchase of abbeys and other benefices at the Court of Rome and against the additional drain on the national wealth involved in the extortions of the papal tax collectors, which exceed the old ecclesiastical valuation known as Baiamund's Roll, dating from the thirteenth century. The Act likewise strikes at

[42] "Statuta," ii. 79-80; Patrick, 82-83.
[43] "Acts," ii. 83. [44] *Ibid.*, ii. 85.

another objectionable practice—that of the union or annexation of the endowments of benefices to bishoprics and abbeys, to the destruction of the churches and the detriment of the common good of the realm.[45] Ten years later (1481) it found it necessary to reaffirm the king's right to appoint to benefices in a vacant diocese pending the appointment of a new bishop.[46] In 1484 the trafficking in benefices at Rome, together with the practice of carrying pleas thither, appears unabated and once more engages the attention of Parliament, which seeks to put a stop to it by ordaining that every cleric proceeding to Rome for such a purpose shall appear before the Auditors of Exchequer and attest his "finance," in order that he may not take or send outwith the realm more money than is allowed by Act of Parliament, and, in case of evasion, suffer punishment in accordance with the said Act. Moreover, a sharp lookout is to be kept in all ports and havens for the purpose of seizing the money thus illegally attempted to be carried furth the realm.[47] At the same time Parliament called for the stricter execution of the law relative to the king's right to appoint to vacant benefices, and directed the chancellor to write to the pope in its vindication.[48] In addition to epistolary communication, it resolved in the following year (1485) to send Schevez, Archbishop of St Andrews, and Blackader, Bishop of Glasgow, as commissioners to Rome to urge in person the right of free election by chapters to all elective benefices, notwithstanding any rules to the contrary made by the papal chancery, and the claim of the king to a voice in the appointments to prelacies and other elective dignities, to which the pope was wont to provide without due regard to the king's will in the matter, as in the case of the filling of the See of Dunkeld, for instance, which the king demands shall be reversed in favour of his own nominee. They are further to request that before making promotions to important offices, the pope shall concede a delay of six months in order to give the king time to forward recommendations in favour of persons agreeable to

[45] "Acts," ii. 99.
[46] *Ibid.*, ii. 133, 141.
[47] *Ibid.*, ii. 166.
[48] *Ibid.*, ii. 166.

his highness. The reason adduced for this delay is political, not religious. All prelates being Members of Parliament and Privy Council, such important appointments should not be made without the king's advice.[49]

Parliament had evidently not much faith in this diplomatic expedient, as far as the buying of benefices at Rome was concerned, and proceeded to decree against those convicted by the testimony of "the best and worthiest clerks of the realm" of this practice, the penalty of high treason.[50] The pope, Innocent VIII., proved so far amenable to the arguments of the commissioners as to grant an interval of eight months before making appointments to benefices of more than the value of 200 florins, so as to enable the king to make known his wishes.[51] Nothing was said about the elective rights of chapters or others, which were practically ignored in the making of these appointments by both pope and king. The concession merely meant that the pope would henceforth give a hearing to the king's representations in making provisions to such benefices, and that he and the king alone were concerned in their disposal.

With this limitation the abuse of provisions remained as before, and Parliament, within a year after the concession was granted (October 1488), is found once more legislating against the hunt for bishoprics, abbeys, and other benefices at the Court of Rome "against the privilege of our sovereign lord, the right of his crown, and the common profit of the realm."[52] This may explain another Act of the same date, that no papal legate shall be admitted within the kingdom until he make known to the king and his council the cause of his coming, so as to make sure that he bring no charge or mandment detrimental to the king and the common weal.[53]

The futility of this legislation and the persistence of the evils against which it was directed appear from the series of Acts which it was still necessary to pass in the reign of

[49] "Acts," ii. 170-172.

[50] *Ibid.*, ii. 173. From this Act we learn that one had been passed n the reign of James II. to the same effect.

[51] Bull of Privilege, "Archbishops of St Andrews," i. 157-158.

[52] "Acts," ii. 183.

[53] *Ibid.*, ii. 183.

James IV.[54] These Acts are similar in terms to their predecessors, but they are still more insistent on the right of election within the realm to all benefices (which practically meant the right of the crown to appoint). They reveal the determination of the king to brook no infringement of the privilege granted by the pope to his predecessor, to have a decisive voice in all ecclesiastical appointments, to put a stop to the practice of carrying disputed pleas to Rome, and to protect the Church and the nation from excessive papal taxation.[55] Notable, too, is the accentuated tendency to assert the authority of the State over the Church, to bring the influence of the common law to bear on the administration of the canon law in the ecclesiastical courts.[56] As in the case of James I., they reflect in this respect the energetic initiative of the strong ruler. There seems, in fact, to have been a growing dissatisfaction with those courts on the part of the laity, and Archbishop Forman in the next reign is found denouncing "the lords temporal and other secular persons" who strive to prevent their tenants from bringing suits before the ecclesiastical judges, which by right and custom pertain to their jurisdiction.[57] Antagonism to the ecclesiastical system, if not to the conventional religion, was evidently on the increase as the result of the prevailing corruption and sordid spirit which this legislation reveals in the ecclesiastical Estate towards the dawn of the Reformation in Scotland. The papal and royal patronage had, between them, resulted in the filling of benefices with too many unworthy clerics, high and low, from motives in which the interest of religion received far less consideration than the interest of the curia and the crown. The struggle for the disposal of benefices was a struggle for power on both sides, though the Parliament undoubtedly made out a strong case on material grounds for the abolition of the whole vicious system of trafficking in benefices under corrupt papal auspices. Parliament evidently regarded the question from the purely economic point of view. There is nothing

[54] "Acts," ii. 209-210 (1489); *cf.* 237-238 (1496).
[55] *Ibid.*, ii. 232-233 (1493).
[56] *Ibid.*, ii. 252.
[57] Patrick, "Statutes," 270.

in its enactments in the fifteenth century to suggest antagonism to the papacy on religious or moral grounds. This may be implied, and Dr Dowden appears to have seen in this legislation moral as well as economic motives.[58] If so, it is rather surprising that they do not take the opportunity of giving expression to it in these Acts, which are concerned solely with the material "scaith and damage" to the realm. Moreover, it should not be forgotten that the prevalent view was that the validity of religious acts and usages did not depend, as the obscure Lollard sectaries were contending, on the moral character of the priesthood from the pope downwards. Pope and priest might be very wicked, even scandalously corrupt; but their immorality did not affect the efficacy of the sacraments, for instance. In this matter Parliament seems to have shared the common doctrine. At all events morality does not seem to have entered into the argument. The time was, however, coming, and coming speedily, when men were to perceive that after all morality has something to do with religion, and the discovery, which the Reformers were to bring to bear on the question, boded ill for a growingly corrupt hierarchy and a growingly effete Church.

Ultimately the crown succeeded in its policy of absorbing Church patronage, without improving the low standard of clerical efficiency. During the minority of James V. the disposition of benefices was entrusted by Parliament to a commission of seven or eight persons chosen by it, of whom the queen mother was to be the principal,[59] and finally, in 1526, it was decided that the nomination to all prelacies should belong to the king and the provision to the pope.[60]

From this Act we learn that there was a widespread tendency on the part of "evil disposed persons," especially in times of disorder, to lay hands on the castles and other edifices of vacant bishoprics and abbeys without asking leave of the king or the ecclesiastics concerned. Against these appropriators of ecclesiastical property, "whereby the kirk and kirkmen are heavily hurt and damaged," the

[58] "Mediæval Church of Scotland," 194.

[59] "Acts," ii. 289 (1524).

[60] *Ibid.*, ii. 309-310. The Act was repeated in 1541, *Ibid.* 3

Act denounces the penalty of high treason, with forfeiture of lands and goods. Parliament might deplore this licence and decree severe penalties against those guilty of it. The Scottish hierarchy itself set the example of the alienation of Church property and endowments. Under the scandalous régime of too many of its bishops and abbots in the early sixteenth century, charters of alienation of Church lands were granted for the benefit of their illegitimate children and others. The records of bishoprics and abbeys testify to the prevalence of this unwarrantable and shady practice among churchmen.[61] Popes and kings themselves were ready enough to take advantage of the device of holding rich benefices *in commendam* to reward their favourites, and it is evident that long before the Reformation a large part of the ecclesiastical revenues were in this way passing into the hands of laymen, who obtained great and rich abbeys *in commendam*, without being qualified to perform the duties of the offices nominally held by them, or concerning themselves with religious interests. The fact is, that the contest between king and pope over Church livings was little more than a farce from the religious point of view. The king, with the Parliament as his tool, was engaged in vindicating or increasing the power of the State over the Church. But he was ready enough to ask rich benefices for his bastard children or his favourites. The popes of the period of this contest were mostly worthless men who were guilty of scandalous misuse of the device of provisions. The result was that both the papacy and the Church were falling more and more into evil repute in Scotland, as elsewhere, by the beginning of the sixteenth century.

After Flodden the bitterness of the Scots against the pope, as the ally of Henry VIII., was so intense that, according to Aleander, they even contemplated the renunciation of their allegiance to Rome in matters temporal and ecclesiastical, if not in those pertaining to the faith.[62]

[61] For details see Hay Fleming, "Reformation in Scotland."

[62] "Letters and Papers of Henry VIII.," xiv. Pt. 1, 843; *cf. Ibid.*, i. 3838, 3876, 3882, 4283.

They showed this embittered spirit by refusing at first to allow the papal envoy to enter Scotland. They narrowly missed anticipating by nearly twenty years the breach with Rome which Henry VIII., who in this episode appears in the part of the pope's ally against them, ultimately consummated. They at least roundly asserted the independence of the Scottish crown and kingdom from the papal claim to interfere in its temporal affairs. "All Christendom admits," protested Forman in 1517, in reference to the papal exemption from his archiepiscopal jurisdiction granted to Prior Hepburn of St Andrews, "that the king and kingdom of Scotland in things temporal, civil, and criminal are subject to the one and eternal God, not to any pope, emperor, or other earthly prince, spiritual or temporal." [63]

The papal jurisdiction was henceforth losing its hold on a nation in which for long it had been so potent an influence. The degeneration of the clergy, which reached its climax in James V.'s reign, was surely sapping that of the Church. James might ally himself with the Church against the nobility and against his uncle, Henry VIII., and proclaim his allegiance to Henry's enemy, the pope. He might threaten the bishops with drastic reformation,[64] and Parliament might pass Acts to this end.[65] King and Parliament, in fact, in this reign treat the Church as a department of State, and while professing respect for the doctrines of the faith and the papal authority, call the bishops and other kirkmen to account for their moral laxity and their remissness in the performance of their office.[66] In the early part of Mary's reign the same tendency to deal authoritatively with ecclesiastical affairs is observable on the part of Parliament, in spite of the protest of the clerical Estate on behalf of the rights of the Provincial Council.[67] These attempts were utterly futile, whilst those of the Provincial Council in 1549, 1552, and 1559 to set its

[63] See Herkless and Hannay, "Archbishops," ii. 154; Hay Fleming, 'The Reformation in Scotland," 161 f.

[64] Knox, "History," i. 82-83; *cf.* "State Papers, Henry VIII.," v. Pt. 4, 119 f.

[65] "Acts," ii. 370. [66] *Ibid.*, ii. 370. [67] *Ibid.*, ii. 415.

house in order came too late. A considerable section of the nobility was frankly hostile, and besides favouring the evangelical movement, was resolved to strip the Church of its power and its wealth, to which virtually, if not ostensibly, they laid claim. A still larger section of the people was alienated by the corruption and oppression which roused the popular ire and forfeited the popular respect. Hence the revolution which in 1559-60 swept the old Church away with such swiftness.

Not the least remarkable feature of this revolution is the radical breach with the old constitution which eliminated prelacy as well as papacy from the Reformed Church. Hardly a vestige of the old ecclesiastical constitution remained, though the old titles survived for some time in connection with the disposal of the endowments. The Reformed Church recognised the divine ordinance of the State, the duty of rendering to rulers and judges due obedience, and the duty of the State to reform religion and maintain the Reformed faith as "the true religion." [68] In principle it thus does not materially differ from the old Church, which also recognised the divine ordinance of the State and its religious function as the abettor and protector of the Church, though it would not have admitted its right to reform it in the sense of the authors of the Confession. It would have reserved this right to the ecclesiastical power, to the pope as the supreme head of the Church acting through the ecclesiastical hierarchy, and in special circumstances through a council convened by him.

On the other hand, the Reformed Church, whilst acknowledging the interrelation of Church and State, and ascribing to the latter the duty of watching over the interests of religion, assumed the right of self-government and elaborated in the First Book of Discipline a system of Church polity which it proceeded to apply, as far as practicable, on its own initiative and without the formal sanction of Parliament. This polity was essentially different from that which it displaced. For the papal-episcopal hierarchy it

[68] See the section on the Civil Magistrate in the Reformed Confession, "Acts," ii. 533-534; Knox, ii. 118-119.

substituted a ministry based on the principle of ministerial parity and, as a rule, elected by the people to their office, and, in any case, subject to the approbation of the individual congregation. For the episcopal office it substituted that of the superintendent, elected for reasons of expediency and without the hierarchical power of the old episcopal order. It instituted the office of elder and deacon who were elected by the people and charged with the duty of assisting the minister in the supervision and administration of the congregation. It established a series of ecclesiastical courts, consisting of kirk session, provincial synod, and General Assembly (the presbytery being added later). This democratic constitution was a reversion to the ancient system of Church government as reflected in the New Testament, and the later constitutional development of the second century, in which Calvin and his fellow-Reformers in Switzerland and France had sought the model of the reformed ecclesiastical organisation. It was largely borrowed from that of the Reformed Church of France, as influenced by Calvin and elaborated in the constitution drawn up for this Church in 1559.[69] It owed something, too, to the constitution drawn up by John à Lasco for his reformed congregation in London, and may also have been influenced by that which Francis Lambert drew up for the Reformed Church of Hesse, though it was not put in operation. It is quite possible that Knox had read this document, which contains the main features of the Presbyterian system adopted in Scotland.

It had hardly anything in common with the old hierarchic constitution, which had no place for the lay element in ecclesiastical government, and was based on the sacerdotal, not the democratic, principle of the spiritual priesthood of believers. The General Assembly, with its elected moderator, its combination of the lay and clerical elements in ecclesiastical legislation, was no mere reproduction of the old Provincial Council. The only resemblance is the elected president. But the office of Moderator of the

[69] It is given in the "Histoire des Églises Reformées," i., ed. of Baum and Cunitz.

Assembly was not modelled on that of the Conservator of the Provincial Council. It was derived, along with other features, from the organisation of the Reformed Churches which owned the leadership of Calvin and looked mainly to Geneva for guidance in the work of organisation. Moreover, the Assembly differed greatly from the Provincial Council in respect of its activity as a legislative body, the potency of its influence on the religious life of the nation, the great part it was destined to play in the vindication of political liberty. The Provincial Council appears but a furtive body throughout the three centuries of its history, and is overshadowed during the greater part of the period by the Parliament. The Assembly was to become a great force in the national history, and to overshadow the Parliament in the struggle with Stewart absolutism. The secret of its dynamic influence lay in the democratic polity which afforded scope to the laity as well as a non-hierarchic ministry in ecclesiastical administration and legislation.[70]

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Printed in Great Britain at The Darien Press, *Edinburgh*

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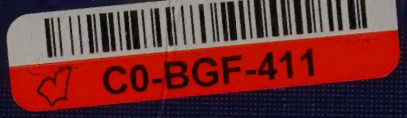
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